# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1901.**

**No. 227.**

---

MARCELLUS A. LANDER, AS TREASURER OF CUYAHOGA COUNTY, OHIO, APPELLANT,

*vs.*

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO.

---

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

---

**FILED JANUARY 12, 1901.**

**(18,019.)**

# (18,019.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1901.

No. 227.

---

MARCELLUS A. LANDER, AS TREASURER OF CUYAHOGA COUNTY, OHIO, APPELLANT,

*vs.*

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO.

---

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

---

INDEX.


| | Original. | Print |
|---|---|---|
| Caption | 1 | 1 |
| Statement of parts of record to be printed | 1 | 1 |
| Transcript from the circuit court of the United States for the northern district of Ohio | 2 | 1 |
| Caption | 2 | 1 |
| Bill of complaint | 3 | 3 |
| Subpœna | 16 | 13 |
| Marshal's return | 16 | 13 |
| Order granting temporary injunction | 17 | 14 |
| Bond on injunction | 18 | 14 |
| Certified copy of order granting injunction | 18 | 15 |
| Marshal's return | 20 | 16 |


---

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 2, 1901.

| | Original. | Print |
|---|---|---|
| Orders of continuance | 21 | 17 |
| Answer | 21 | 17 |
| Replication | 26 | 21 |
| Notice as to appointment of special examiner | 27 | 22 |
| Order appointing special examiner | 28 | 23 |
| Motion for appointment of master | 28 | 23 |
| Order appointing master | 29 | 24 |
| Order of continuance | 30 | 24 |
| Order fixing time to take testimony | 30 | 25 |
| Motion for leave to withdraw depositions | 31 | 25 |
| Motion for leave to amend answer | 31 | 26 |
| Affidavit of M. G. Norton | 32 | 26 |
| Order granting leave to amend answer | 34 | 28 |
| Amendment to answer | 34 | 28 |
| Order fixing time to take testimony | 39 | 32 |
| Replication to amendment to answer | 39 | 32 |
| Order to withdraw depositions | 40 | 33 |
| Orders of continuance | 41 | 33 |
| Report of special master | 42 | 34 |
| Findings of fact | 42 | 34 |
| Record in case of Mercantile National Bank *vs.* Whitbeck | 52 | 42 |
| Bill of complaint | 52 | 43 |
| Subpœna | 61 | 50 |
| Marshal's return | 62 | 51 |
| Restraining order | 62 | 51 |
| Order correcting record | 63 | 52 |
| Order granting leave to file demurrer | 63 | 52 |
| Demurrer | 64 | 52 |
| Order overruling demurrer | 65 | 53 |
| Answer | 66 | 54 |
| Replication | 75 | 61 |
| Order appointing special master | 76 | 62 |
| Affidavit of T. P. Handy | 76 | 62 |
| Report of special master | 77 | 63 |
| Decree | 78 | 64 |
| Order vacating decree | 79 | 64 |
| Decree | 80 | 65 |
| Conclusions of law | 81 | 66 |
| Clerk's certificate to volume 1 | 87 | 71 |
| Stipulation as to exclusion of certain testimony | 88 | 72 |
| Stipulation as to exclusion of certain testimony | 89 | 72 |
| Notice to take testimony | 90 | 73 |
| Evidence for complainant | 90 | 73 |
| Stipulation as to number of private banks | 91 | 74 |
| Stipulation as to use of testimony in other cases | 91 | 74 |
| Testimony of Theodore M. Bates | 92 | 75 |
| Extracts from auditor's report for 1897 | 109 | 89 |
| Table XI—Statement of valuation, &c. | 111 | 91 |
| Extracts from Ohio Building and Loan Association report | 122 | 101 |
| Stipulation as to use of auditor's report as evidence | 123 | 101 |
| Extract from auditor's report for 1897 | 124 | 102 |
| Testimony of Albert E. Akins | 125 | 103 |

| | Original. | Print |
|---|---|---|
| Akin Exhibit B—Report of condition of Cleveland national bank | 142 | 118 |
| Report of condition of Central national bank | 143 | 119 |
| Report of condition of Commercial national bank | 144 | 120 |
| Report of condition of Euclid Avenue national bank | 146 | 121 |
| Report of condition of First national bank | 147 | 122 |
| Report of condition of Mercantile national bank | 148 | 124 |
| Report of condition of National Bank of Commerce | 150 | 125 |
| Report of condition of National City bank | 151 | 126 |
| Report of condition of Park national bank | 152 | 127 |
| Report of condition of State national bank | 154 | 128 |
| Report of condition of Union national bank | 155 | 129 |
| Report of condition of Western Reserve national bank | 156 | 131 |
| Testimony of Albert E. Akins (recalled) | 194 | 167 |
| Akins Exhibit B²—Letter, Akins to cashier, December 7, 1897. | 202 | 173 |
| C—Form of return | 204 | 175 |
| Return of Mercantile national bank for 1897 | 206 | 177 |
| Testimony of John Van Nostrand | 211 | 182 |
| Record in case of Mercantile National Bank *vs.* Whitbeck | 213 | 184 |
| Bill of complaint | 214 | 184 |
| Subpœna | 223 | 191 |
| Marshal's return | 224 | 192 |
| Restraining order | 224 | 192 |
| Order correcting record | 225 | 192 |
| Order granting leave to file demurrer | 225 | 193 |
| Demurrer | 225 | 193 |
| Order overruling demurrer | 227 | 194 |
| Answer | 227 | 195 |
| Replication | 236 | 202 |
| Order appointing special master | 237 | 202 |
| Affidavit of T. P. Handy | 237 | 203 |
| Report of special master | 239 | 204 |
| Decree | 240 | 204 |
| Order vacating decree | 241 | 205 |
| Decree | 241 | 206 |
| Bill of exceptions | 242 | 206 |
| Certificate of division of opinion | 244 | 208 |
| Record in case of Mercantile National Bank *vs.* Kimberly, No. 4496 | 247 | 210 |
| Bill of complaint | 248 | 211 |
| Subpœna | 256 | 217 |

| | Original. | Print |
|---|---|---|
| Marshal's return | 257 | 218 |
| Preliminary injunction | 257 | 218 |
| Injunction bond | 258 | 219 |
| Restraining order and return | 259 | 219 |
| Order *pro confesso* | 260 | 221 |
| Decree | 260 | 221 |
| Motion to vacate decree | 261 | 222 |
| Order setting aside decree | 262 | 222 |
| Answer | 263 | 223 |
| Replication | 270 | 229 |
| Stipulation as to other cases | 271 | 229 |
| Decree | 272 | 230 |
| Record in case of Mercantile National Bank *vs.* Kimberly, No. 4648 | 272 | 231 |
| Bill of complaint | 273 | 231 |
| Subpœna | 280 | 237 |
| Marshal's return | 281 | 237 |
| Order allowing temporary injunction | 281 | 238 |
| Notice of motion for injunction | 282 | 238 |
| Bond for injunction | 283 | 239 |
| Restraining order | 283 | 239 |
| Appearance for defendant | 285 | 241 |
| Decree *pro confesso* | 285 | 241 |
| Order withdrawing appearance | 286 | 241 |
| Order extending time to plead | 286 | 241 |
| Answer | 286 | 242 |
| Replication | 289 | 244 |
| Decree | 290 | 245 |
| Record in case of Mercantile National Bank *vs.* Shields, No. 5122 | 291 | 246 |
| Bill of complaint | 292 | 246 |
| Order allowing injunction | 299 | 252 |
| Injunction bond | 300 | 253 |
| Preliminary injunction | 301 | 253 |
| Marshal's return | 302 | 254 |
| Order for continuance | 302 | 255 |
| Decree *pro confesso* | 303 | 255 |
| Order setting decree *pro confesso* aside | 303 | 255 |
| Demurrer | 304 | 256 |
| Decree | 305 | 256 |
| Record in case of Mercantile National Bank *vs.* Shields, No. 5197 | 306 | 257 |
| Bill of complaint | 307 | 258 |
| Exhibit A—Ordinance No. 3222 | 315 | 264 |
| Subpœna | 316 | 265 |
| Marshal's return | 317 | 266 |
| Order allowing injunction | 317 | 266 |
| Injunction bond | 318 | 267 |
| Writ of injunction | 319 | 268 |
| Continuance | 320 | 269 |
| Decree *pro confesso* | 321 | 269 |
| Continuance | 321 | 269 |
| Final decree | 321 | 270 |

| | Original. | Print |
|---|---|---|
| Motion to vacate decree | 322 | 270 |
| Order modifying decree | 323 | 271 |
| Testimony of Joseph R. Molyneaux | 324 | 271 |
| Norton T. Horr | 332 | 279 |
| Edwin R. Perkins | 341 | 286 |
| Samuel E. Williamson | 347 | 292 |
| Thomas H. Wilson | 356 | 300 |
| J. J. Sullivan | 364 | 307 |
| W. J. Mather | 377 | 318 |
| James Barnett | 379 | 320 |
| W. S. Tyler | 384 | 324 |
| Orville L. Jones | 391 | 330 |
| A. L. Withington | 395 | 334 |
| Wm. Bingham | 398 | 336 |
| Joseph Colwell | 402 | 339 |
| Clerk's certificate to volume 2 | 405 | 343 |
| Evidence for defendant | 406 | 343 |
| Testimony of Peter R. Fahey | 406 | 343 |
| G. N. Calvert | 420 | 356 |
| S. C. Hale | 427 | 362 |
| Frank J. Smith | 437 | 372 |
| G. N. Calvert (recalled) | 439 | 373 |
| F. J. Smith | 439 | 374 |
| Charles J. Murfey | 440 | 374 |
| Exhibit Murfey A—Report of earnings, &c., 1896 | 445 | 379 |
| B—Report of earnings, &c., 1897 | 445 | 379 |
| C—Report of earnings, &c., 1897 | 446 | 379 |
| Certificate of special examiner | 446 | 380 |
| Stipulation as to evidence, &c. | 448 | 381 |
| Evidence for defendant | 449 | 382 |
| Testimony of W. D. Guilbert | 449 | 382 |
| Guilbert Exhibit A—Form of return | 457 | 389 |
| B—Tax notice of 1899 | 458 | 390 |
| C—Tax notice | 470 | 399 |
| Certificate of special examiner | 472 | 401 |
| Evidence for complainant | 473 | 402 |
| Deposition of G. W. Taylor | 473 | 402 |
| Report of condition of Mercantile national bank, July 23, 1897 | 487 | 414 |
| Exhibit Table XI—(See side page 111) | 487 | 414 |
| XII—Statement of valuation of State banks | 488 | 415 |
| Complainant's exceptions to master's report | 494 | 420 |
| Stipulation as to trial of cases | 496 | 422 |
| Defendant's exceptions to master's report | 497 | 423 |
| Motion for order on master to report testimony, &c. | 502 | 426 |
| Order on master to report testimony | 503 | 427 |
| Additional exceptions of complainant | 504 | 428 |
| Opinion of Taft, J. | 505 | 429 |
| Final decree | 516 | 438 |
| Application for appeal | 517 | 439 |
| Assignment of errors | 518 | 439 |
| Appeal bond | 520 | 441 |
| Citation | 521 | 442 |

| | Original. | Print |
|---|---|---|
| Marshal's return | 522 | 442 |
| Clerk's certificate to volume 3 | 522 | 443 |
| Appearance for appellant | 524 | 443 |
| Stipulation extending time to file briefs | 524 | 444 |
| Order extending time to file briefs | 525 | 444 |
| Minute entry of argument and submission | 525 | 444 |
| Decree | 526 | 445 |
| Application for appeal | 527 | 445 |
| Assignment of errors | 528 | 446 |
| Bond on appeal | 532 | 447 |
| Opinion | 534 | 449 |
| Citation | 550 | 462 |
| Marshal's return | 551 | 462 |
| Clerk's certificate | 552 | 463 |

1 *Transcript of Record.*

In the United States Circuit Court of Appeals for the Sixth Circuit.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Appellant,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Appellee.

*Supplemental Statement of Parts of the Transcript which Appellant Desires Printed.*

The appellant hereby states that the portions of the record which it desires printed as stated in its statement heretofore filed, are included in the following portions of the transcript in the cause, to wit:

1. All of volume 1.
2. Page- 246 to 375, inclusive, of volume 2.
3. Pages 113 to the last page, inclusive, of volume 3.

NORTON P. HORR,
*Of Solicitors for Appellant.*

Cleveland, Ohio, February 7, 1900.

The appellee has received a copy of the foregoing supplemental statement this day.

P. H. KAISER,
*Solicitor for Appellee.*

No. 817. U. S. circuit court of appeals. Mercantile National Bank *vs.* R. S. Hubbard, treas. Supplemental statement of parts of record to be printed for appellant. Filed Feb. 8, 1900. Frank O. Loveland, clerk.

2 In the United States Circuit Court of Appeals for the Sixth Circuit.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Appellant,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Appellee.
No. 817.

*Statement of Parts of the Transcript which the Appellee Desires Printed.*

The appellee hereby requests that the following portions of the record be printed as included in the transcript in said cause, to wit:

1. All of volume one.

2. All of volume 2, except pages 153 to 244, inclusive.
3. All of volume 3.

P. H. KAISER,
*County Solicitor.*
F. L. TAFT,
*Ass't County Solicitor.*
J. M. SHEETS,
*Attorney General.*
SMITH W. BENNETT,
*Of Counsel for Appellee.*

Cleveland, Ohio, Feb. 9th, 1900.

Counsel for appellant acknowledges the service upon them of a copy of the foregoing statement, the day and year above written.

NORTON P. HORR,
*Of Counsel for Appellant.*

817. Appellee's statement of parts of the record to be printed. Filed Feb. 13, 1900. Frank O. Loveland, clerk.

UNITED STATES OF AMERICA, }
*Northern District of Ohio, Eastern Division,* } *ss:*

Record of the proceedings of the circuit court of the United States within and for the eastern division of the northern district of Ohio, in the cause and matter hereinafter stated, and the same being disposed of at a regular term of said court begun and held at the city of Cleveland, in said district, on the first Tuesday in October, being the 3rd day of said month, in the year of our Lord one
3 thousand eight hundred and ninety-nine, and of the Independence of the United States of America the one hundred and twenty-fourth, to wit, on the 23rd day of December, A. D. 1899.

Present: The Honorable William H. Taft, U. S. circuit judge, and Augustus J. Ricks, U. S. district judge.

THE MERCANTILE NATIONAL BANK OF Cleveland
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio. } No. 5714. Chancery.

Said action was commenced on the 23rd day of December, A. D. 1897, and proceeded to final disposition at the term and day above written, and during the progress thereof pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order and on the dates hereinafter stated, to wit:

*Bill of Complaint.*

In the Circuit Court of the United States, Northern Division of Ohio, Eastern District.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Ohio, Plaintiff,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Defendant.
} No. 5714.

Bill of complaint.

To the honorable the judges of the circuit court of the United States in and for the northern district of Ohio, eastern division:

1. Your complainant, The Mercantile National Bank of Cleveland, Ohio, now comes and respectfully represents that it is a national banking association incorporated under and by virtue of the act of Congress entitled, "An act to provide for the national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, 1864,
4 and the subsequent amendments thereof, and is established and doing business in the city of Cleveland, in said district and division, and it brings this its bill of complaint against R. S. Hubbard, treasurer of Cuyahoga county, Ohio, a resident of said city of Cleveland, and a citizen of Ohio and of said northern district and eastern division.

2. The plaintiff further represents and avers that its grievances hereinafter complained of arose and are exclusively founded on the violation by the respondent, and by others, whose legal acts he is carrying into effect, of the rights of the plaintiff and of its shareholders accorded to them by section 5219 of the Revised Statutes of the United States securing to said shareholders a restriction of the rate and limit of taxes assessed upon their said shares to that assessed upon other moneyed capital in the hands of individual citizens of the State of Ohio, as will hereinafter fully appear.

3. The plaintiff further represents and avers that it has a capital stock of one million dollars divided into ten thousand shares of one hundred dollars each, all of which is paid up, and for which certificates are outstanding and owned by a large number of persons, most of whom reside in the State of Ohio; that in accordance with section 2765 of the Revised Statutes of Ohio, then and now in force, the cashier of the plaintiff duly reported in duplicate to the auditor of said county of Cuyahoga the resources and liabilities of said banking association at the close of business on the Wednesday next preceding the second Monday of May, 1897, together with a full statement of the names and residences of the stockholders therein, and with the number of shares held by each and the par value thereof as required by said statute; that included in said return so made by said cashier was the real estate owned by the plaintiff, returned at

$309,000, which is separately assessed and charged on the tax duplicate of said county, and the tax thereon paid by the plaintiff to the treasurer of said county, the defendant, aside from the taxes set forth in this bill.

4. It says that its cashier also included in said return a statement of the plaintiff's surplus and undivided profits at one hundred and seventy-four thousand five hundred and forty dollars.

It says that said auditor of Cuyahoga county thereupon proceeded, as required by section 2766 of the Revised Statutes of Ohio, to fix the total value of such shares according to their true value in money; that he added the valuation of the plaintiff's surplus and undivided profits to the amount of its paid-up capital stock, deducted therefrom its real estate valued as aforesaid at $309,000, and fixed as the value of the shares sixty per cent. of the remainder, to wit, $519,320, exclusive of the assessed value of its real estate. He then made out and transmitted to the annual State board of equalization for incorporated banks, a copy of the report so made by said cashier, together with the valuation of said shares fixed as aforesaid by said auditor; that said board of equalization professing to act under sections 2808 and 2809 of the Revised Statutes of Ohio, did examine the returns aforesaid made by said cashier to said county auditor and the valuation of said shares as so fixed by said county auditor, and did, on December 6th, 1897, and not before, add to the valuation of such shares the sum of one hundred and twenty-three thousand dollars, thereby fixing the valuation of said shares at $642,320.00, and the auditor of the State of Ohio did certify said valuation to said auditor of said county of Cuyahoga, and said auditor of the said county of Cuyahoga did enter the same upon the tax duplicate of said county of Cuyahoga for the year 1897, and did assess taxes against the same at the rate of 3.03 cents on each dollar's valuation, which was the rate of taxation for the taxes assessed for the year 1897 within said county, city and sewer district, and which amounted on said valuation of shares to $19,462.30. The plaintiff further avers that by section 1042 of the Revised Statutes of Ohio it is made the duty of the auditor of Cuyahoga county, on November 1st of each year, to deliver to the county treasurer a true copy or duplicate of the books containing the tax-list required to be made by him for the year, and by section 2808 of the Revised Statutes of Ohio it is made the duty of the State board for the equalization of the shares of incorporated banks, to meet on the third Tuesday of June annually, at the office of the auditor of State, and then and there examine the returns of banks to the county auditors, and the value of the shares as fixed by the county auditors as the same have been reported by the county auditors to the State auditor; and to hear complaints and to equalize the value of said shares according to the rules prescribed by the statute for valuing and equalizing the values of real and personal property. The plaintiff says that said board for the equalization of the shares of incorporated banks so required to meet on the third Tuesday of June annually for the purpose of making such equalization, did not meet for the purpose of examining

such returns and of equalizing the valuation of shares, until
6 December 6th, 1897, a day long subsequent to the time that the duplicate is, by the statute aforesaid, required to be placed in the hands of the treasurer for the collection of taxes, and a day subsequent to the time the duplicate was in fact delivered to the defendant, and said board then met and without any complaint that the valuation fixed by said county auditor was in any respect wrong, and without notice to the complainant, which the statute requires of their meeting or intended action or to any of the shareholders, made such pretended examination and increase of valuation of complainant's shares; and on complainant's hearing of said action of said board it at once applied to said board for a hearing before them and was by it informed that one could not be had before the 22nd day of December, 1897, a time subsequent to the day on which by the statute one-half of the tax on such valuation is required to be paid, in order to avoid a penalty thereon. Therefore the complainant submits that the said board for the equalization of bank shares had no jurisdiction or power to increase the valuation so fixed by the auditor on the shares of the complainant for the year 1897, and that its action in respect thereof was void and of no effect.

5. The complainant avers that the assessed valuation of its shares so fixed by said State board of equalization and so entered on the tax duplicate of Cuyahoga county against its said shareholders was over seventy-four per cent. of the true value of the money, property and assets so as aforesaid thereby covered; that all other personal property, including moneys on deposit, promissory notes and amounts due and receivable, are and have been for many years assessed for taxation by the taxing officers of the State of Ohio at a rate of not exceeding 60 per cent. of their face or apparent value; that the valuation so as aforesaid fixed by said auditor of Cuyahoga county on this plaintiff's shares of stock was fixed at 60 per cent. of the true value thereof, and that such assessment was in conformity with his uniform practice and the uniform practice of the taxing officers of said county and other counties in the State of Ohio on all classes of investments. The plaintiff further avers that said State board of equalization knowingly and designedly did fix a much higher per centum of valuation and assessment for taxation upon the shares of the plaintiff's capital stock than was assessed upon other moneyed capital in the hands of individual citizens of the State of Ohio, and much higher than that fixed on other moneyed capital in the hands of such citizens in said county of Cuyahoga and said city of Cleveland.

7 6. The plaintiff further represents and avers that although by the second section of the twelfth article of the constitution of the State of Ohio, it is provided that, "laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, and shall tax all real and personal property according to its true value in money;" and while it is further provided by the third section of the same article that, "all property in banking shall bear a burden of taxation equal to that imposed on the property of individuals," and by the fourth sec-

tion of the thirteenth article of said constitution it is further provided that "the property of corporations now existing or hereafter created shall forever be subject to taxation the same as the property of individuals;" yet the various assessing and taxing officers of the county of Cuyahoga, in which the complainant is situated, including the boards of equalization, auditor and assessors, have uniformly for now more than fifteen consecutive years assessed moneyed capital in the hands of individual citizens of the State invested in securities of all kinds at the valuation of 60 per cent. of the face or apparent value of such credits and investments as the true value in money thereof for their taxation, and all other taxable credits and securities have by said officers been uniformly fixed at 60 per cent. of their face value for purposes of taxation. The plaintiff further says that in and by the act of Congress under which the plaintiff is incorporated the right of the State to tax any owner of the plaintiff's shares is made subject to this condition, "that the taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such State."

7. The complainant avers that by section 2730 of the Revised Statutes of Ohio it is enacted that, "in this title (taxation) the term 'credits' shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable things, or for labor or services due or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this State, other than such as are held to be money, as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money,) over and above the sum of legal *bona fide* debts owing by such person, but in making up the sum of such debts there shall be taken into account no obligation to any mutual insurance company, nor unpaid subscription to the capital stock of any joint stock company, nor any subscription
8 for any religious, scientific, literary or charitable purpose, nor any acknowledgment of any indebtedness unless founded on some consideration actually received and believed at the time of making such acknowledgment to be a safe consideration therefor, nor any acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation." By section 2736 of the Revised Statutes of Ohio it is provided that every person required to list property for taxation shall deliver to the assessor annually a statement of all personal property, moneys, credits and other property in his possession or under his control on the tax day which he is required to list for taxation, and by section 2737 it is provided that such statement, among other things, shall truly set forth the amount of credits possessed by such person as that term is by the above-recited statutes defined.

8. The complainant further avers that a large amount of moneyed capital in the hands of individual citizens of the State of Ohio invested in promissory notes and other legal obligations, securities, claims and demands, amounting to several hundred millions of dollars, is by the aforesaid provision allowing a deduction of legal *bona fide* debts to be made therefrom, expressly exempted from tax-

ation. It says that there were returned for taxation in the State of Ohio in 1891, $113,943,512, of credits after deducting from the aggregate of credits owned by persons making such returns, their *bona fide* debts as provided by section 2730; that in the year 1892 there was returned of such excess of credits $113,800,000; in the year 1894, $110,877,000; in the year 1895, $106,389,000; in the year 1896, $102,810,000, and in the year 1897, more than a hundred millions of dollars. It says that among the classes of investments of moneyed capital covered by such returns of excess credits were all debts owing for money loaned and secured either by mortgage on real estate, or by pledge of personal property, or wholly unsecured, but owing by responsible persons. Complainant is informed and believes, and therefore alleges the fact to be that the amount of credits held by residents and individual citizens of the State of Ohio, consisting of moneys owned, but secured by pledges of personal property, or unsecured but owed from responsible persons, was more than treble the amount of excess of credits so returned for taxation in each of the years aforesaid; and that at least $200,000,000 of such credits were exempted by the aforesaid provision from taxation. Complainant avers that during each of the years hereinbefore specified there was owed to citizens and residents of the State of
9 Ohio, and secured by mortgage on real estate within the State a sum in excess of $250,000,000, and that all such claims and demands were by virtue of the provision aforesaid of the statute of Ohio, in each of the said years, exempted from taxation. The complainant avers that by act of General Assembly of the State of Ohio, passed May 1st, 1891, entitled, "An act to provide for the organization, regulation and inspection of building and loan associations, and to repeal certain laws therein named," and by section 835 D of the statutes of Ohio, in force prior to the passage of said act of May 1st, 1891, it was enacted that, "the shares and loans advanced to members (of building and loan corporations), shall be exempt from taxation, except shares of stock upon which no loans have been made or money advanced by the company, shall be considered and held as credits, and the said individual members shall list for taxation the number of shares held by them, at the true value thereof, in money on the day preceding the second Monday in April in each year, and the same shall be assessed at such valuation for taxation and taxed as other property." It avers that in each of the years 1891, 1892, 1894, 1895, 1896 and 1897, such building and loan corporations organized under the laws of, and doing business in said State of Ohio, had paid-up capital stock amounting to over $270,000,000; that there was loaned to the members on said stock in each of said years, $70,000,000, which was by said statute exempted from taxation, and that $200,000,000 of said stock, being the amount of stock, less the amount of said loans, was, by virtue of aforesaid provision, required to be listed and assessed as credits from which *bona fide* debts were authorized by said statute, and were, in fact, deducted and exempted from taxation. It avers that such building and loan corporations so organized and doing business were empowered and authorized by statute to borrow and loan money and to do a general

banking business with their members and depositors. The complainant further alleges that in the savings banks alone in Cuyahoga county there is on time deposit an amount exceeding the entire capital of all the national banks in the State, which deposits are credits belonging to the depositors from which legal *bona fide* debts are authorized by the statute to be deducted to ascertain the taxable value of said deposits. The complainant avers that the allowance of these various exemptions from taxation of money capital in the hands of individual citizens of the State, under the laws of the State of Ohio, result in and make an unjust and unlawful discrimination against moneyed capital invested in national bank shares as to which no exemption or deduction is provided by the laws of the State, and which discrimination is in direct violation of the restrictions of section 5219 of the Revised Statutes of the United States. Complainant avers that there was invested in shares of stock of national banks located and doing business in the State of Ohio during each of said years 1891, 1892, 1894, 1895, 1896 and 1897, over and above the value fixed for taxation of the real estate owned by said national banking associations, a sum in excess of $34,000,000, but not exceeding $50,000,000. The complainant avers that the tax lawfully assessed and paid on its shares annually amounts to upwards of twenty per cent. of the income arising from the operations of complainant.

9. The plaintiff further represents and avers that on said day next preceding the second Monday of April, 1897, and at the time the cashier of said plaintiff made his said return to the auditor of Cuyahoga county, Ohio, of the names and residences of the shareholders of said association with the numbers and par value of the shares of the capital stock of the plaintiff for the year 1897, the following-named persons were stockholders of the plaintiff, owning and holding the number of shares set opposite their respective names, which they still continue to own, to wit:

| | No. of shares. |
|---|---|
| J. V. Painter | 400 |
| Samuel E. Williamson | 50 |
| S. C. Ford | 35 |
| Orville L. Jones | 62 |
| Truman P. Handy | 400 |
| William Bingham | 150 |
| R. K. Hawley | 50 |
| Wm. G. Mather | 70 |
| Edwin R. Perkins | 325 |
| L. A. Murfey | 40 |
| Chas. L. Murfey | 65 |
| W. S. Tyler | 250 |
| James Barnett | 313⅓ |
| A. L. Withington | 30 |

10. The plaintiff further represents and avers that each of said stockholders was, at the times hereinbefore recited to wit, on the day preceding the second Monday of April 1897, and between the first

and second Monday of May, 1897, indebted and owing to
11 others, of legal, *bona fide* debts, exclusive of obligations to mutual insurance companies, of all unpaid subscriptions to the capital stock of joint stock companies, of all subscriptions for religious, scientific, literary or charitable purposes, of all liabilities as surety, and of all acknowledgments of any indebtedness made for the purpose of diminishing the amount of taxable credits or founded on inadequate or fictitious consideration, a sum, in excess of all credits from which, under the laws of the State of Ohio, he was entitled to deduct said debts to an amount equal to the actual and par value of the number of shares specified opposite their respective names, and which said excess of said debts over said credits as aforesaid, the said shareholders above named were entitled to have deducted from the assessed value of said shares so severally owned by them.

11. The plaintiff further avers that with and accompanying the return so made by the cashier of the plaintiff in said year 1897 there was furnished by said cashier and by said individual stockholders, and each of them, to the auditor of said county proof that they were so respectively indebted in excess of their respective credits in sums equal to or greater than the true value in money of their respective holdings of stock in the plaintiff, and demanded that the same should be deducted from the assessed value of the shares owned by them but the said auditor refused to make such deductions and insisted that the whole of said shares as then assessed should be placed and remain upon the tax duplicate, and the said defendant insisted and still insists upon the payment of the whole of the tax as assessed thereon. It says that the auditor of said county in making the duplicate for the year 1897 refused to deduct and abate said indebtedness and delivered the duplicate without such deduction to the defendant as treasurer of said county, and that said defendant as treasurer threatens and is about to collect by distraint or otherwise, the said taxes on said shares of stock with said deductions disallowed.

12. The complainant further avers that by section 2839 of the Revised Statutes of Ohio, it is declared, that:

"Any taxes assessed on any shares of stock or the value thereof, of any bank or banking association, shall be and remain a lien on such shares from the first Monday in May in each year, until such taxes are paid; and in case of non-payment of such taxes at the time required by law, by any shareholder, and after notice received of the county treasurer of the non-payment of such taxes, it shall be unlawful for the cashier or other officers of such bank or bank-
12 ing association, to transfer or permit to be transferred, the whole or any portion of said stock until the delinquent taxes thereon, together with costs and penalties, shall be paid in full, and no dividend shall be paid on any stock so delinquent so long as such taxes, penalties or costs, or any part thereof, remain due and unpaid."

The complainant says that said defendant further threatens in case of non-payment of said taxes so unlawfully levied and assessed,

to give the notice provided for in said section, and thereby prevent the transfer of any of said shares of stock from said shareholders or any other persons to whom they or either of them may have sold the same. The complainant further avers that if the shares of said shareholders are permitted to be sold under the lien created on them by section 2839 of said Revised Statutes of Ohio, or otherwise, irreparable injury would not only be done to each of the shareholders, but also to the complainant and it would thereby be subjected to great loss of standing, and credit, for the redress of which, the law affords no remedy, and the franchises with which your orator is invested by the act of Congress, as aforesaid, would be greatly impaired in value, and the disability imposed upon the complainant to make transfers, or to pay dividends upon shares, upon which such illegal tax remains unpaid, would injuriously affect all its ordinary business, and introduce confusion and uncertainty into its transactions, and the consequent loss of public confidence, upon which its success depends; and if the complainant should pay said illegal taxes and attempt to deduct the amount from dividends or other funds of the shareholders in its hands, it would be subjected to a great multiplicity of suits brought by its separate shareholders, for so doing, and in any event, a great number of suits would be rendered necessary to adjust the rights of all the parties, and the complainant would be subjected to great expense and irreparable injury thereby.

13. The plaintiff says that by reason of the premises above set forth there should be deducted from the assessment against the plaintiff's shares, now standing on the duplicate of said county, that portion of the assessment represented by the addition so made by the said State board of equalization, to wit: $123,000, together with the taxes assessed thereon at the present rate, for said year, to wit: $3,726.90, and that there should further be deducted and withheld from said duplicate the assessment now standing thereon against the individual stockholders of the plaintiff hereinbefore named, to the extent of their holdings of stock aforesaid, amounting in the aggregate, inclusive of the taxes on the valuation added thereto by said State board of equalization to $4,359.62, and exclusive thereof to $3,524.78; making a total amount in dispute herein over $7,200.

13

14. Plaintiff further represents and avers that on the 16" day of December, 1897, on behalf of the shareholders owning shares of its capital stock it duly tendered to the defendant as treasurer of Cuyahoga county, and offered to pay for the taxes due December 20th, 1897, on said shares, the sum $6,105.31, and is still ready and willing to pay the same as well as the other half of said taxes on the same basis of valuation to fall due on the 20th of June, 1898, if said treasurer will receive — or if this honorable court will so order; but said treasurer has so far refused to receive said payments unless the plaintiff would also pay the half of the whole amount of said tax as it stands on the duplicate.

15. The plaintiff further says that heretofore, to wit, on the 8th day of April, 1887, in an action then pending in this court by this plaintiff against Horatio N. Whitbeck, the predecessor of the de-

fendant as treasurer of Cuyahoga county, to enjoin the collection of taxes assessed against the shares of plaintiff's stock growing out of the refusal of the taxing officers of said county to allow the deductions of *bona fide* debts of individual stockholders from the assessed value of their shares and growing out of the addition to the gross assessment against the shares of plaintiff's stock made by said State board of equalization in addition to the valuation fixed by said auditor, and in which said action it was alleged and proved that the taxing officers of said county, assessed at the time the shares of said plaintiff together with all their personal property listed for taxation in said taxing district at sixty per cent. of their value, exclusive of said addition by said State board of equalization, and in which said action said defendant therein represented the same interest, sustained the same relation, was charged with the same duties to the public as the present defendant, and in which said action the issues made were in all respects the same as those made by this bill of complaint, and were joined by said defendant, the laws of the State of Ohio and of the United States relating to the subject being the same then as now, and now as then, the plaintiff says that this court held, determined and adjudicated that its said shareholders were, by law, entitled to a deduction of *bona fide* debts from the
14 value of their said shares to an equal amount fixed for taxation, and in said action this court gave judgment perpetually enjoining said treasurer and his successors from collecting or attempting to collect the taxes or assessment on the valuation of said shares to an amount equal to said debts from which said deduction was sought to be made on the ground that the disallowance of said deductions by said auditor was a discrimination against money invested in national bank shares prohibited by the aforesaid act of Congress. The plaintiff says that said issue so determined and adjudged was between the same parties, and involved the same subject-matter and that the judgment given therein is wholly unreversed and in full force and operation.

16. The plaintiff further represents and avers that like suits, with like issues, were by it instituted in this court against the respective predecessors of the present defendant, who, at those times, held the office of treasurer of Cuyahoga county, Ohio, in the years 1886, 1888 and 1893, and that upon issue being joined in each of said actions, by consideration of this court judgments were rendered in favor of this plaintiff against said respective defendants on May 14th, 1888, and on September 28th, 1889, and on December 30th, 1893, directing the allowance of said deductions. The plaintiff alleges that the issues so determined and adjudged were between the same parties, involved the same subject-matter and that the judgments therein given are wholly unreversed and still in full force and operation.

17. The plaintiff, now and here, brings into court the sum due to said defendant, as treasurer, for the tax lawfully levied on said shares against its said shareholders and submits the same to the order and direction of this court.

Inasmuch, therefore, as the plaintiff is remediless by the strict rules of law and relievable only in equity, it prays that said R. S.

Hubbard, as treasurer of said county of Cuyahoga, may be made a party defendant to this bill of complaint; and that a writ of subpœna may issue against him, and that he may be required to answer the premises; that the plaintiff may have granted unto it during the pendency of this action a writ of injunction strictly restraining and enjoining the said R. S. Hubbard as treasurer of said county of Cuyahoga, and his successor or successors in office, from collecting or attempting to collect from the plaintiff or from its said individual shareholders named in this bill by distraint or otherwise, any of said taxes as the same now stand charged on the duplicate of said county, including those levied on such unlawful increase of valuation by said State board of equalization for incorporated bank shares, permitting, however, said treasurer without prejudice to his rights in the premises to receive the amounts so as aforesaid tendered by the plaintiff to him; and that said defendant and his successors in office aforesaid may on final hearing be perpetually enjoined from collecting or attempting to collect the taxes aforesaid; and that the plaintiff may have such other and further relief in the premises as equity and good conscience require.

W. W. BOYNTON,
*Solicitors for Complainant.*

UNITED STATES OF AMERICA,
*Northern District of Ohio, Eastern Division.*

Be it remembered that this 23 day of December, A. D. 1897, personally came before me, L. A. Murfey, who, being by me first duly sworn, deposes and says that he is the assistant cashier of the complainant in the foregoing bill of complaint; that he has heard the same read and knows the contents thereof; that all the allegations and statements therein contained, as derived from the information of others, he believes to be true, and all other allegations and statements therein made, are true in substance and in fact.

L. A. MURFEY, *A. Cash.*

Sworn to before me and in my presence subscribed this 23d day of December, A. D. 1897.

[SEAL.]

A. R. HORR,
*Notary Public.*

Tax fee 40c., p'd by plaintiff.

Endorsements on bill of complaint.

No. 5714. In the circuit court of the United States, northern division of Ohio, eastern district. The Mercantile National Bank of Cleveland, plaintiff, against R. S. Hubbard, as treasurer of Cuyahoga county, Ohio, defendant. Bill of complaint. Filed Dec. 23, 1897. Irvin Belford, clerk U. S. circuit court, N. D. O.—5714. Mercantile National Bank *vs.* R. S. Hubbard, treas. Bill of complaint. Filed Dec. 23, 1897. Irvin Belford, clerk U. S. circuit court, N. D. O.

16 *Subpœna in Chancery.*

THE UNITED STATES OF AMERICA, *Northern District of Ohio, Eastern Division,* } ss:

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon R. S. Hubbard, as treasurer of Cuyahoga county, Ohio, if he be found in your district, to be and appear in the circuit court of the United States, within and for the district aforesaid, at Cleveland, on the first Monday in March next to answer a certain bill in chancery filed and exhibited in the said court against him by the Mercantile National Bank of Cleveland.

Hereof he is not to fail under the penalty of the law, thence ensuing, and have you then and there this writ.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 23rd day of December, A. D. 1897, and in the 122nd year of the Independence of the United States of America.

[SEAL.] IRVIN BELFORD, *Clerk,*
By JNO. VAN NOSTRAN,
*Deputy Clerk.*

*Memorandum.*

The said defendant is required to enter his appearance in this suit, in the clerk's office of said court, on or before the first Monday of February, 1898, otherwise the said bill may be taken *pro confesso.*

IRVIN BELFORD, *Clerk.*

Endorsements on subpœna in chancery when issued.

No. 5714. United States circuit court, northern district of Ohio, eastern division. In chancery. The Mercantile National Bank of Cleveland, *vs.* R. S. Hubbard, Co. treasurer. Subpœna. Returnable February 7, 1898. Rule day for appearance, February 7, 1898. Rule day for answer March 7th, 1898. W. W. Boynton, complainant's solicitor.

Endorsements on subpœna in chancery when returned.

*U. S. Marshal's Return.*

THE UNITED STATES OF AMERICA, *Northern District of Ohio,* } ss:

17 Received this writ on the 23rd day of December, 1897, and on the 27th day of December, 1897, I served the same at Cleveland, on the within-named R. S. Hubbard, as treasurer of Cuyahoga county, Ohio, by delivering to him a true and certified copy thereof.

M. A. SMALLEY, *Marshal,*
By W. S. SNYDER, *Deputy.*

*Fees.*

| | |
|---|---|
| Service | $2 00 |
| Travel | 12 |
| Total | $2 12 |

Returned and filed Dec. 28, 1897.

IRVIN BELFORD,
*Clerk U. S. Circuit Court, N. D. O.*

*Order Granting Temporary Injunction.*

October term, A. D. 1897, to wit, December 23rd, A. D. 1897.

Present: The Honorable Augustus J. Ricks, U. S. district judge.

THE MERCANTILE NATIONAL BANK OF Cleveland, Ohio, *vs.* R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio. } No. 5714. Equity.

On motion of the plaintiff by its attorney, after due notice to the defendant, and good cause being shown therefor, it is ordered that on an undertaking being given in the sum of $14,600.00 with sureties to the approval of the clerk of this court, a preliminary writ of injunction issue herein, restraining and enjoining said defendant, R. S. Hubbard, as treasurer of the county of Cuyahoga and State of Ohio, and his successors in office, from collecting or attempting to collect from the plaintiff or from its individual shareholders named in said bill, by distraint or otherwise, any of the taxes named in the bill, as the same stand charged upon the duplicate of Cuyahoga county, except that said respondent is hereby given authority without prejudice to his rights in the premises, to receive from the plaintiff $6,105.31 on the taxes due December 20th, 1897, and
18 $6,105.31 due June 20, 1898, being the taxes by said plaintiff's bill, admitted to be justly due from it and its individual shareholders to said defendant, and that said writ remain in force until the further order of this court.

*Undertaking in Injunction.*

Know all men by these presents, that we, E. R. Perkins, and Chas. L. Murfey are held and firmly bound unto R. S. Hubbard, as treasurer of Cuyahoga county, Ohio, and his successors in the sum of fourteen thousand six hundred dollars, to the payment whereof we bind ourselves, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated this 23rd day of December, A. D. 1897.

The condition of the above obligation is such that, whereas the said The Mercantile National Bank of Cleveland, Ohio, citizen of

the State of Ohio, have filed in the circuit court of the United States for the northern district of Ohio a bill in chancery against the said R. S. Hubbard, as treasurer of Cuyahoga county, Ohio, and have obtained an allowance of an injunction, as prayed for in said bill, from the Honorable Augustus J. Ricks, judge of said court.

Now if the said The Mercantile National Bank shall abide the decision of said court, in said cause, and pay all moneys and costs which shall be adjudged against it in case the said injunction shall be dissolved, then these presents shall be void; otherwise to remain in full force.

E. R. PERKINS. [SEAL.]
CHAS. L. MURFEY. [SEAL.]

Endorsements on undertaking in injunction.

No. 5714. U. S. circuit court, northern district of Ohio. No. 5714. The Mercantile National Bank of Cleveland, *vs.* R. S. Hubbard, treas'r. Injunction bond. Approved and filed Dec. 23rd, 1897. Irvin Belford, clerk.

*Certified Copy of Order Granting Preliminary Injunction to Marshal for Service.*

THE UNITED STATES OF AMERICA, *Northern District of Ohio, Eastern Division,* } *ss:*

19 At a stated term of the circuit court of the United States, within and for the eastern division of the northern district of Ohio, begun and held at the city of Cleveland, in said district, on the first Tuesday in October, being the 5th day of said month, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred and twenty-second, to wit, on Thursday, the 23rd day of December, A. D. 1897.

Present: The Honorable Augustus J. Ricks, U. S. district judge.

Among the proceedings then and there had were the following, to wit:

In the United States Circuit Court for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF Cleveland, Ohio, Plaintiff, *vs.* R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Defendant. } Equity. No. 5714. Journal Entry.

On motion of the plaintiff by its attorneys, after due notice given to the defendant, and good cause being shown therefor, it is ordered that on an undertaking being given in the sum of $14,600 with sureties to the approval of the clerk of this court, a preliminary writ of injunction issue herein, restraining and enjoining said defendant,

R. S. Hubbard, as treasurer of the county of Cuyahoga, and State of Ohio, and his successors in office, from collecting or attempting to collect from the plaintiff or from its individual shareholders named in said bill, by distraint or otherwise, any of the taxes named in the bill, as the same stand charged upon the duplicate of Cuyahoga county, except that said respondent is hereby given authority without prejudice to his rights in the premises, to receive from the plaintiff $6,105.31 on the taxes due December 20th, 1897, and $6,105.31 due June 20, 1898, being the taxes by said plaintiff's bill, admitted to be justly due from it and its individual shareholders to said defendant, and that said writ remain in force until the further order of this court.

THE UNITED STATES OF AMERICA, *ss:*

I, Irvin Belford, clerk of the circuit court of the United
20 States, within and for the northern district of the State of Ohio, do hereby certify that I have compared the within and foregoing transcript with the original order entered upon the journal of the proceedings of said court in the therein-entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said court, at Cleveland, in said district, this 23rd day of December, A. D. 1897, and in the 122nd year of the Independence of the United States of America.

IRVIN BELFORD, *Clerk.*

[SEAL.] By JNO. VAN NOSTRAN,
*Deputy Clerk.*

Endorsements on order when issued.

No. 5714. United States circuit court, northern district of Ohio, eastern division. The Mercantile National Bank of Cleveland *vs.* R. S. Hubbard, as treasurer of Cuyahoga county, Ohio. Certified copy of order.

Endorsements on order when returned.

*U. S. Marshal's Return.*

THE UNITED STATES OF AMERICA, }
*Northern District of Ohio,* } *ss:*

Received this writ on the 23rd day of December, 1897, and on the 27th day of December, 1897, I served the same at Cleveland, on the within-named defendant, R. S. Hubbard, as treasurer of Cuyahoga county, Ohio, by delivering to him a true and certified copy thereof.

M. A. SMALLEY, *Marshal,*
By W. S. SNYDER, *Deputy.*

*Fees.*

| | |
|---|---|
| Service | $2.00 |
| Travel | .12 |
| Total | $2.12 |

Returned and filed Dec. 28, 1897.

IRVIN BELFORD,
*Clerk U. S. Circuit Court, N. D. O.*

21 *Order of Continuance.*

October Term, A. D. 1897, to wit, January 31st, A. D. 1898.

Present: The Honorable Augustus J. Ricks, U. S. district judge.

MERCANTILE NATIONAL BANK
*vs.*
R. S. HUBBARD, Treasurer. } Equity. No. 5714.

This cause is continued to the next term of this court.

*Order of Continuance.*

February Term, A. D. 1898, to wit, April 4th, A. D. 1898.

Present: The Honorable Augustus J. Ricks, U. S. district judge.

MERCHANTS' NAT'L BANK OF CLEVELAND
*vs.*
R. S. HUBBARD, Treasurer. } 5714. Chancery.

This cause is continued to the next term of this court.

*Answer.*

Circuit Court of the United States in and for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Plaintiff,
*against*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Defendant. } Answer. No. 5714.

Now comes the said defendant, R. S. Hubbard, as treasurer of Cuyahoga county, Ohio, and for answer to the bill of complaint of said complainant, The Mercantile National Bank of Cleveland,
22 filed herein, says: Now and at all times reserving unto himself all benefits and advantages of exception which can or may be taken to the many errors, uncertainties and other imperfections in complainant's said bill of complaint contained, or to so much, or such parts thereof as this defendant is advised is material or necessary to answer unto, answering says:

SEC. 1. That he admits that the complainant, The Mercantile National Bank of Cleveland, is a national banking association incorporated under and by the act of Congress, and that it is doing business in the city of Cleveland, in said district and division, and that defendant, R. S. Hubbard, is treasurer of Cuyahoga county, and a resident of the city of Cleveland, and of said district.

SEC. 2. Defendant denies that he is doing any illegal act, or that he is violating any rights of complainant, or its shareholders as accorded to them by section 5219 of the Revised Statutes of the United States, as alleged in paragraph two of said bill of complaint.

SEC. 3. Defendant admits that the complainant has a capital stock of the amount and divided into the number of shares stated in said bill of complaint, and that said shares are fully paid up as alleged in the bill of complaint, for which certificates are outstanding, but defendant has no knowledge as to whether or not most of the persons owning said certificates reside in the State of Ohio, or as to whether or not the cashier truly reported the names and residences of all the stockholders thereof and the number of shares held by each, as alleged in paragraph three of said bill of complaint, and ask proof thereof; and he denies that the cashier of complainant duly reported to the authorities of the county of Cuyahoga all the resources and liabilities of said banking association.

SEC. 4. Defendant admits that the cashier of complainant included in his return a statement of complainant's alleged surplus and undivided profits of the amounts stated in said bill of complaint; but avers that the same was not the true amount of complainant's actual surplus and undivided profits. And defendant admits that the auditor of Cuyahoga county undertook to add the valuation of complainant's surplus and undivided profits to the amount of its paid-up capital stock and to value the same at sixty (60) per cent. of its true value in money, as he estimated such valuation, and which as estimated amounted to said sum stated in said bill of complaint; and that said board of equalization added the amount stated in said bill of complaint, and the auditor of said State of Ohio did certify said valuation to the auditor of said
23 county of Cuyahoga, and said auditor of said Cuyahoga county did enter the same upon the tax duplicate of said county, and did assess the said stockholders at the rate on each dollar's valuation as estimated, the amount stated therein; but defendant avers, that the auditor was greatly deceived and misled by complainant's statement of the true value of its returns to him for taxation, and that the returns so made did not exceed forty (40) per cent. of the actual value of said property and assets of complainant; when in truth and in fact the said complainant should have returned the same at its true value in money. And defendant avers, that said board of equalization began work at the time the statutes require, and continued its work continuously, but for want of the necessary information it could not complete its work earlier than December 6th, 1897. And defendant denies each and every other allegation in paragraph four in said bill of complaint contained not hereinbefore specifically admitted.

SEC. 5. Defendant denies that the assessed valuation of complainant's shares, as fixed by the State board of equalization, and as entered upon the tax duplicate of Cuyahoga county against complainant's shareholders was over, or equal to sixty (60) per cent. of the true value of the money, property and assets so covered. He denies that all other personal property, including money on deposit, promissory notes and amounts due and receivable, are and have for many years been assessed for taxation by the taxing officers of the State of Ohio, at less than sixty (60) per cent. of their true value. He denies that the valuation was fixed by the auditor of Cuyahoga county at sixty (60) per cent. of the true value thereof, in money, and that said assessment was in conformity to his uniform practice or the uniform practice of the taxing officers of said county and other counties of the State of Ohio, on all or any classes of investments.

Defendant further denies, that said State board of equalization knowingly or designedly, or did in fact, fix a higher per centum of valuation and assessment of taxation upon the complainant's capital stock than was assessed upon other moneyed capital in the hands of individual citizens or other moneyed capital in said State, or in said county of Cuyahoga, or in said city of Cleveland, as alleged in said paragraph five (5) in said bill of complaint.

SEC. 6. Defendant further denies that the assessing and taxing officers of the county of Cuyahoga, or the board of equaliza-
24 tion, auditor and assessors, have uniformly, and for more than fifteen consecutive years, or for any length of time, assessed moneyed capital in the hands of individual citizens of the State invested in securities of all or any kinds at the valuation of sixty (60) per cent. of the true value in money thereof, or that all or any other taxable credits have by said officers been uniformly fixed at sixty (60) per cent. of their face value for the purpose of taxation.

SEC. 8. Defendant denies, that the exemptions and taxations of moneyed capital in the hands of individual citizens of the State, or in State banks, building and loan associations organized under the laws of the State of Ohio, make an unjust and unlawful discrimination against moneyed capital invested in national bank shares in the State. On the contrary defendant avers that the tax levied and assessed against moneyed capital invested in national bank shares, and especially of complainant, is less than is assessed upon the property, of individual citizens and moneyed capital invested in State banks in said county and throughout the State of Ohio.

He denies that the tax assessed and paid on the shares of complainant's stock amounted to upwards of twenty (20) per cent. of the income arising from the operations of complainant; as to the other allegations in paragraph eight the defendant has no knowledge as to the truth or falsity thereof, and denies the same and asks proof thereof.

SEC. 9. The defendant admits that the parties named in section nine (9) in said bill of complaint owned the number of shares of the

capital stock of complainant on the day next preceding the second Monday in April, 1897, alleged in said bill of complaint, and still own the same.

SEC. 10. Defendant denies, that each or either of said stockholders named in paragraph nine (9) were on the day preceding the second Monday in April, 1897, and between the first and second Monday in May, 1897, indebted and owing to others of legal *bona fide* debts exclusive of obligations to mutual insurance companies, of all unpaid subscriptions to the capital stock of joint stock companies, and of all acknowledgments of any indebtedness made for the purpose of diminishing the amount of the taxable credits, a sum in excess of all credits from which under the laws of the State of Ohio, he was entitled to deduct said debts to an amount equal to the actual and par value of the number of specific shares opposite their respective names, and which said excess of said debts were over credits as aforesaid; and he denies that the said shareholders above named were entitled to have deducted any sum whatever from the assessed value of said shares so severally owned by them.

SEC. 11. Defendant further denies, that accompanying the return made by said cashier of the complainant, in said year, 1897, there was furnished by said cashier, and by said individual stockholders, or either of them, to the auditor of said county, proof that they were so respectively indebted in excess of their respective credits in sums equal to or greater than their true value in money of their respective holdings of the stock of complainant; and he denies that any deductions should be made from the assessed value of the above stock owned by them, or either of them. He admits that the auditor of said county refused to make any deductions for complainant or its shareholders, and defendant admits that he is about to collect the taxes that are legally due from complainant.

SEC. 13. Defendant denies, that there should be deducted from assessment of complainant's shares now standing on the duplicate of said county the sum stated in said bill of complaint, or any other sum, or that there should be deducted any sum now standing against the individual stockholders of complainant.

SEC. 14. Defendant admits that said complainant offered to pay for the taxes due December 20th, 1897, on said shares, the sum stated in said bill of complaint, but says; that said complainant refused to pay the balance of the sum so due him and unpaid upon the shares of the stock of complainant. And he denies each and every other allegation in said bill of complaint contained not hereinbefore specifically admitted, and now having fully answered defendant asks to be dismissed with his costs of suit.

P. H. KAISER,
FRANK S. MONNETT,
MINER G. NORTON,
*Attorneys for Defendant.*

STATE OF OHIO, } ss:
*Cuyahoga County,* }

R. S. Hubbard, being duly sworn, on his oath says. that he, as treasurer of Cuyahoga county, Ohio, is the defendant in the above action, and that he believes the facts stated in the foregoing answer to be true.

R. S. HUBBARD.

Subscribed in my presence, and sworn to before me this 11th day of April, A. D. 1898.

OLIVER S. CLEWELL,
*Notary Public.*

[SEAL.]

Tax fee $ .40.

26 Endorsements on answer.

No. 5714. In the circuit court of the United States, northern district of Ohio, eastern division. The Mercantile National Bank of Cleveland, plaintiff, against R. S. Hubbard, as treasurer of Cuyahoga county, Ohio, defendant. Answer. Filed Apr. 12, 1898, Irvin Belford, clerk, U. S. circuit court, N. D. O. P. H. Kaiser, Frank S. Monnett and Miner G. Norton, att'ys for defendant.

*Replication.*

United States Circuit Court, Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF Cleveland, Ohio, Plaintiff,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Defendant.
} No. 5714. Replication.

The plaintiff saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, for replication thereunto says, that it does and will ever maintain and prove its bill of complaint to be true, certain and sufficient in the law to be answered unto by said defendant, and it says that the answer of the defendant is uncertain, evasive and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove, as this honorable court shall direct and as in and by its said bill of complaint it has already prayed.

W. W. BOYNTON,
*Solicitor for Plaintiff.*

Endorsements on replication.

No. 5714. U. S. circuit court northern district of Ohio, eastern division. The Mercantile National Bank of Cleveland *vs.* R. S. Hubbard as treasurer of Cuyahoga county, Ohio. Replication. Filed Apr. 18, 1898. Irvin Belford, clerk, U. S. circuit court, S. D. O.

27 *Notice as to Appointment of Special Examiner.*

In the United States Circuit Court, Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Ohio, Plaintiff,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Defendant.
} Notice. No. 5714.

To the defendant:

You are hereby notified that the plaintiff will apply to Judge Hammond of said court at the court-room in the Federal building, at Toledo, Ohio, on Monday, August 8th, 1898, at 2 o'clock p. m. for the appointment of an examiner and a stenographer for the purpose of taking testimony in this cause. The plaintiff desires the evidence to be adduced in this cause to be taken orally.

W. W. BOYNTON,
*Attorney for Plaintiff.*

We have notice of the foregoing application this 5th day of August, 1898.

P. H. KAISER,
*Attorneys for Defendant.*

Endorsements on notice.

5714. Mercantile National Bank of Cleveland, *vs.* R. S. Hubbard, Co. treas'r. Notice as to appointment of special examiner. Filed Aug. 13, 1898. Irvin Belford, clerk, U. S. circuit court, N. D. O.

Endorsed on the back of said notice was the following:

Appoint Irvin Belford, the clerk of the court as special examiner to take this proof Aug. 11, 1898.

E. S. HAMMOND, *Judge.*

28 *Order Appointing Irvin Belford Special Examiner.*

Chancery Order Book 3–51.

In the United States Circuit Court, Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Ohio, Complainant,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Defendant.
} 5714. Chancery.

Upon reading and filing notice of motion for the appointment of a special examiner herein with admission of service, it is ordered by the court that Irvin Belford, on account of his experience in such matters, be and he is hereby appointed special examiner herein under the 67th rule as amended. The said special examiner shall take the testimony in behalf of both complainant and respondent and is authorized to take the same in the northern district of Ohio, or elsewhere according to the convenience and requirements of parties. Said testimony shall be given orally by witnesses and be taken down stenographically by a skilled stenographer approved by the parties or appointed by the court, and thereafter reduced to typewriting and when subscribed by the witnesses and duly certified the same shall be admitted in evidence.

Done at chambers in the city of Toledo, Ohio, this 11th day of August, 1898.

E. S. HAMMOND, *Judge.*

Entered August 13, 1898.

*Notice of Motion for Appointment of Master.*

In the United States Circuit Court, Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, Plaintiff,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Defendant.

29 Motion for appointment of a master.

Now comes the plaintiff and moves the court to appoint a master in said cause to examine the testimony taken and to be taken therein, and to make therefrom a special finding of facts upon the issues joined between the parties, and to report the same and his conclusions of law thereon to the court, the ground of said motion

being that said testimony is very voluminous requiring much time for its consideration.

W. W. BOYNTON,
*Its Attorney.*

Cleveland, Ohio, Aug. 26, 1898.

The defendant has notice of the plaintiff's intention to present the above motion and identical motions in causes Nos. 5715-5716-5717-5718-5719-5721-5722-5723-5726-5732 to Judge Hammond at the Federal court-room in Toledo, Ohio, on Tuesday, Sept. 6th, 1898, at 10 o'clock a. m.

P. H. KAISER,
*Attorney for Defendant.*

Endorsements on notice.

5714. U. S. circuit court. Mercantile National Bank *vs.* R. S. Hubbard, as treasurer, etc. Notice of motion for master's appointment. Filed Aug. 30, 1898. Irvin Belford, clerk, U. S. circuit court, N. D. O.

*Order Appointing Irvin Belford Master.*

Chancery Order Book 3–70.

United States Circuit Court.

MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio. } Order.

On motion of the plaintiff for the appointment of a master in said cause it is ordered that Irvin Belford, because of his experience in matters of accounting, be and he is hereby appointed special master in said cause to examine the record and the evidence now on file or hereafter taken therein and to make a special finding of fact on the issues joined between the parties and to report the same to the court and his conclusions of law thereon.

Done at chambers at the city of Toledo, O., Tuesday, Sept. 6th, 1898.

(Signed) E. S. HAMMOND, *Judge.*

Entered September 6th, '98.

*Order of Continuance.*

April term, A. D. 1898, to wit, September 29th, A. D. 1898.

Present: The Honorable E. S. Hammond, U. S. district judge, sitting by designation, and Honorable Augustus J. Ricks, U. S. district judge.

MERCANTILE NAT'L BANK
*vs.*
R. S. HUBBARD, Treasurer. } Chancery. 5714.

This cause is continued to the next term of this court.

*Order Setting Time for Taking Testimony.*

October term, A. D. 1898, to wit, November 2nd, A. D. 1898.

Present: The Honorable E. S. Hammond, U. S. district judge, sitting by designation, and Honorable Augustus J. Ricks, U. S. district judge.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Ohio, *vs.* R. S. HUBBARD, as Treasurer. } 5714. Equity.

On motion of plaintiff it is ordered that the defendant take the testimony of his witnesses and file the same in this court by January 1st, 1899, and that the plaintiff have until the 15th of January to reply thereto by any additional testimony.

31 *Motion for Leave to Withdraw Depositions.*

In the United States Circuit Court for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, *vs.* R. S. HUBBARD, as Treasurer of Cuyahoga County. } Motion.

Now comes the plaintiff and moves the court for leave to withdraw the deposition of L. B. Boynton and George H. Lewis, auditor of Lorain county, and for ground of said motion says that the matter contained in said depositions is wholly irrelevant to the issue. The plaintiff desires to withdraw the same in order to save the defendant any trouble or expense in taking testimony in answer to the matter contained in said depositions.

W. W. BOYNTON,
*Solicitor for Pl'ff.*

Endorsements on motion.

The Mercantile Nat'l Bank *v.* R. S. Hubbard, as treas. 5714. Motion for leave to withdraw depositions. Filed Nov. 9, 1898. Irvin Belford, clerk, U. S. circuit court, N. D. O. W. W. Boynton.

*Application for Leave to Amend Answer.*

In the United States Circuit Court for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Ohio, Plaintiff,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Defendant.
} No. 5714.

Application for leave to amend answer.

Now comes the defendant, by his counsel, M. G. Norton and
32 P. H. Kaiser, and moves the court for an order permitting him, the said defendant, to amend his answer herein and proffers to the court with this motion the affidavit of said M. G. Norton in support thereof, and also the amendment to said answer showing the new matter introduced by such amendment.

P. H. KAISER,
F. S. MONNETT, AND
M. G. NORTON,
*Of Counsel for the Defendant.*

CLEVELAND, O., 11, 29, '98.

The plaintiff acknowledges notice of the above motion on the day above written.

W. W. BOYNTON,
*Counsel for Plaintiff.*

Endorsements on application.

5714. In the United States circuit court for the northern district of Ohio, eastern division. The Mercantile National Bank, plaintiff, *v.* R. S. Hubbard, treasurer, defendant. Application for leave to amend answer. Filed Nov. 29, 1898. Irvin Belford, clerk, U. S. circuit court, N. D. O.

*Affidavit of M. G. Norton on Application.*

In the United States Circuit Court for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Ohio, Plaintiff,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Defendant.
} Affidavit.

THE STATE OF OHIO, *Cuyahoga County,* } *ss:*

M. G. Norton, being by me, the undersigned authority, first duly sworn, deposes and says that he is one of the attorneys for the de-

fendant herein, prepared the original answer herein which is on file in this case; that in the preparation of the answer as filed, that he was not acquainted with the matters as set forth in the
33 amendment to the answer, and which has been tendered to the court for the purpose of having the same filed herein; that the facts contained in said answers were not known to him at the time of the preparation of said original answer and have been disclosed to him only since the taking of the testimony on the part of the complainant herein, at which time the facts as recited in said answer *was* for the first time disclosed and the same made known to him. That said defenses as set forth in said amendment to said answer are material to the merits of the case in controversy, and that if the same had been known to him at the time of the preparation of the answer herein that he would have inserted the same as additional defenses in the answer as prepared by him; that the same will not require or occasion new or additional testimony to be taken on the part of the said complainant herein for the reason that said statement of facts as set forth in said answer has been fully disclosed in the testimony adduced by the complainant herein; that not only did he, the said affiant, not know of the existence of the facts set forth in said amendment to said answer, but he could not have, by the exercise of reasonable diligence, obtained such information; that at the time of the preparation of said answer the attorney general representing the State of Ohio in said cause was not present and had nothing whatever to do with the drawing of said answer, as the State of Ohio was not a party and said attorney general was only taken into said cause after said cases had been at issue, and the facts as known to said attorney general as set forth in said amendment to said answer, were not disclosed, or any part of the same made known by him to said affiant at the time of the preparation of the original answer herein. Said affiant tenders with his affidavit herein said amendment to said answer making evident to the court the contents thereof and the necessity and merits of the plea as therein contained.

M. G. NORTON.

Sworn to before me and signed in my presence by the said M. G. Norton, this 29th day of November, A. D. 1898.

IRVIN BELFORD,
*Clerk U. S. C. Court, N. D. Ohio.*

Endorsements on affidavit.

5714. In the United States circuit court for the northern district of Ohio, eastern division. The Mercantile National Bank of Cleveland, O., plaintiff, *vs.* R. S. Hubbard, treasurer, etc., defendant. Affidavit. Filed Nov. 29, 1898. Irvin Belford, clerk, U. S. circuit court, N. D. O.

34 *Leave to Amend Answer.*

October Term, A. D. 1898, to wit, December 23rd, 1898.

Present: The Honorable Augustus J. Ricks, U. S. district judge.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,
*vs.*
R. S. HUBBARD, as Treasurer. } 5714. Chancery.

Leave is hereby granted the defendant to file instanter an amendment to his answer and all questions as to costs on his application are continued until the further order of this court.

*Amendment to Answer.*

In the United States Circuit Court for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,
Plaintiff,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio,
Defendant. } No. 5714.

Amendment to answer.

The defendant, as an amendment to his answer filed herein, says:

That under section 2765 of the Revised Statutes of Ohio, it became and was the duty of the cashier of said plaintiff bank to make out and return to the auditor of said county of Cuyahoga (being the county in which said plaintiff bank is located), between the first and the second Monday of May, A. D. 1897, a report in duplicate, under oath, exhibiting in detail and under appropriate heads, the resources and liabilities of such bank, at the close of business on the Wednesday next preceding said second Monday of May, 1897.

That by section 2766 of the Revised Statutes of Ohio, upon receipt of such report, it became and was the duty of the county auditor to fix the value of the shares of said plaintiff bank, according to their true value in money, and deduct from the aggregate
35 sum so found the value of the real estate included in the statement of resources as the same stands on the duplicate; and thereupon said county auditor shall make out and transmit to the annual State board of equalization for incorporated banks a copy of the report so made by the cashier of said plaintiff bank, together with the valuation of such shares as so fixed by said county auditor.

Defendant further says that the valuation as so fixed by the said county auditor upon said shares of bank stock of plaintiff bank, was based upon the resources and liabilities so returned by the cashier of said bank. That said resources and liabilities of said plaintiff bank were not truly returned by the cashier thereof, but that the resources

thereof *was* returned by said cashier at a much less amount than they actually were at said time, to wit, at least $114,872 less than the same should have been returned.

That the total value of the shares of said bank as fixed by the said county auditor of Cuyahoga county, was estimated upon said untrue return of said cashier; and said auditor having based his calculations as to the value of said shares upon said untrue return of said cashier, and without knowing that said return was untrue, thereupon wrongfully fixed the value of said shares at $636,690, and deducted from the aggregate sum so found the value of the real estate of said bank, amounting to $117,370, leaving the value of said shares, less said real estate as so wrongfully fixed by said auditor, at $519,320.

That thereupon the county auditor made out and transmitted to the annual State board of equalization for incorporated banks a copy of the report so made by the cashier of plaintiff bank, together with the valuation of such shares so fixed by said auditor.

That acting under and pursuant to the powers vested in it by section 2809 of the Revised Statutes of the State of Ohio, and pursuant to the rules and practice adopted by said board, it, the said board for the equalization of the shares of incorporated banks, after due notice of the time and place thereof given to the said plaintiff bank, did meet and examine the return of the said plaintiff bank as so wrongfully made by the cashier thereof, and also examined the value of the shares of said bank as fixed by said county auditor, and transmitted to said board.

This defendant says that upon the examination of said return of said plaintiff bank made to the county auditor of Cuyahoga county and the value of the shares of said plaintiff bank as fixed by said county auditor, said board for the equalization of the shares
36 of incorporated banks, from the evidence before them, found and adjudged that the value of the shares of said plaintiff bank, as compared with the value of the shares of all other incorporated banks in said State of Ohio, was grossly inadequate, and was far below the value as fixed upon such other shares.

That in order to equalize the value of the shares of said plaintiff bank with the values of all other incorporated bank shares in said State; and in order to make the capital stock of all incorporated banks in said State equal in valuation for the purpose of taxation, having in view their actual cash value, said board took the valuation of bank shares as reported to it by the auditor of Cuyahoga county, Ohio, including the report of the plaintiff bank therein, and compared the same with the reports of the same character made to said board by the auditor of all other counties of said State.

That upon such comparison being made, as aforesaid, the said board found and adjudged that in order to equalize the assessed value of the shares of said plaintiff bank, with the assessed valuation of other incorporated banks of said State, it was necessary to increase the assessed value of the shares of plaintiff bank in the sum of — per cent., which said board accordingly did, thereby fixing the total assessed value of said plaintiff bank shares at $642,320, being $123,000 more than the value fixed by the county auditor aforesaid; and said

action of said board of equalization of the shares of incorporated banks, is the same action as is complained of by the said plaintiff bank herein.

Second. Said defendant, for a second and further defense herein, says that by section 167 of the Revised Statutes of Ohio, it is provided that the auditor of State may remit such taxes and penalties thereon as he ascertains to have been illegally assessed, and such penalties as have accrued, or may accrue, in consequence of the negligence or error of any officer required to do any duty relating to the assessment of property for taxation, or the levy or collection of taxes, and he may, from time to time, correct any error in any assessment of property for taxation or in the duplicate of taxes in any county; provided, that when the amount to be remitted in any one case shall exceed one hundred dollars, he shall proceed to the office of the governor and take to his assistance the governor, attorney general, and in all such cases may remit no more than shall be agreed upon by a majority of the officers named.

37 This defendant says that at the time of the action of said board for the equalization of shares of incorporated banks as set forth in said first defense herein, being at the time of the appearance of the said plaintiff bank before it, the said board, that it was informed by the governor, auditor of State and attorney general that if any injustice had been done it, the said plaintiff bank, by the action of said board for the equalization of shares of incorporated banks, or if the finding and judgment of said board was excessive, illegal or erroneous, that said officials composed of the governor, the attorney general and auditor of State would convene under section 167 of the Revised Statutes of Ohio, and would give to said plaintiff bank an opportunity to be heard before them sitting as a board of revision created by section 167, and if said plaintiff bank should make it *to* appear that said finding and judgment of said board for the equalization of shares of incorporated banks were excessive, illegal or erroneous, that said board of revision would correct the same; and said officials aforesaid offered then and there to convene as such board to consider the matters and evidence brought before them as such board by said plaintiff bank, and offered to convene at such time as would be satisfactory to said plaintiff bank, so as to enable the said plaintiff bank to produce its evidence, and to be heard in person and by counsel, and have such matters heard before it, and the inequalities and injustice, if any had been done it, corrected.

Defendant says that upon such offer being so made to said plaintiff bank, by said officials, that said bank, by its officers and agents, then refused to submit themselves, or the subject-matter that had been heard and passed upon by said board for the equalization of bank shares, to the jurisdiction of said board of revision; and then and there informed said officials that they had been advised by their counsel that said board of revision created under section 167 of the Revised Statutes of Ohio had no power or authority to hear said matters so offered to be heard, and had no jurisdiction in the premises, and for that reason, and for no other reason, refused to submit

themselves or said matters in dispute to the jurisdiction of said board of revision.

Said defendant says that said section 167 of the Revised Statutes of Ohio is *in parti materia*, and is a part of the taxing system of said State of Ohio, and of the machinery for the collection of the public revenue of said State; and thereby provides that when the amount of taxes to be remitted, as in the case at bar, exceeds one hun-
38 dred dollars, that said board of revision, consisting of the governor, auditor of State and attorney general, thereby constitutes and is an appellate board to the action of the board for the equalization of shares of incorporated banks, and has the power, authority and jurisdiction conferred upon it by said section of the Revised Statutes of Ohio, to review, revise and correct all excessive, illegal or erroneous assessments, findings or judgments that might have been made by said State board for the equalization of shares of incorporated banks in connection with, or in regard to the assessment, levy and collection of taxes in said State, and that said plaintiff bank not having appealed to said board of revision, consisting of the governor, auditor of State and attorney general, as provided by said section 167 of the Revised Statutes of Ohio, and not having given said board an opportunity to review, revise and correct the judgment and finding of said board, if said judgment and finding were excessive, illegal or erroneous, and by the refusal of said plaintiff bank to submit said cause and matters in dispute to said board of revision, it, the said plaintiff bank, has not exhausted its usual and ordinary remedy at law, and has not exhausted the remedies provided in such cases by the statutes of Ohio, that thereby this court has no jurisdiction in equity to hear and to determine said cause, and said plaintiff bank should not be permitted to further prosecute its action herein.

P. H. KAISER,
M. G. NORTON,
F. S. MCKNETT,
*Counsel for Defendant.*

THE STATE OF OHIO, }
*Cuyahoga County,* } ss:

Miner G. Norton, being first duly sworn, deposes and says that he is an attorney for defendant in foregoing action, and the statements made and allegations contained in the foregoing amendment to the answer of the defendant filed herein are true in substance and in fact.

MINOR G. NORTON.

Sworn to before me and signed in my presence by the said Miner G. Norton, this 23rd day of December, A. D. 1898.

JNO. VAN NOSTRAN,
*Deputy Clerk, U. S. Circuit Court, N. D. O.*

Endorsements on amendment to answer.

No. 5714. In the United States circuit court for the northern district of Ohio, eastern division. The Mercantile National
39 Bank of Cleveland, Ohio, plaintiff, *vs.* R. S. Hubbard, treas., defendant. Amendment to answer. Filed Dec. 23, 1898. Irvin Belford, clerk, U. S. circuit court, N. D. O.

*Order Fixing Time for Taking Testimony.*

October Term, A. D. 1898, to wit, December 23rd, A. D. 1898.

Present: The Honorable Augustus J. Ricks, U. S. district judge.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, *vs.* R. S. HUBBARD, as Treasurer. } 5714. Chancery.

On application of the defendant the order heretofore made limiting the time of the defendant to take testimony and to file the same in this court, is hereby modified so that the defendant is ordered to take the testimony of his witnesses and file the same in this court by Jan. 15th, 1899, and that the plaintiff is allowed until the 1st of February, 1899, to reply thereto by any additional testimony.

*Replication to Amendment to Answer.*

In the United States Circuit Court for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, Plaintiff, *vs.* R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Defendant. } No. 5714.

Replication to amendment to answer.

This replicant, saving and reserving to itself all and all
40 manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the amendment to the answer of said defendant, for replication thereunto, says that it does and will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendant, and that the amendment to the answer of said defendant is very uncertain, evasive and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said amendment to the answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this honor-

able court shall direct, and humbly — as in and by its said bill it has already prayed.

W. W. BOYNTON,
*Solicitor for Pl'ff.*

Endorsements on replication to amendment to answer.

No. 5714. The U. S. circuit court. The Mercantile Nat'l Bank of Cleveland, O., *vs.* R. S. Hubbard, treas. Replication to amendment to answer. Filed Jan. 5, 1899. Irvin Belford, clerk, U. S. circuit court, N. D. O.

*Order to Withdraw Depositions.*

October Term, A. D. 1898, to wit, January 17th, A. D. 1899.

Present: The Honorable E. S. Hammond, U. S. district judge, sitting by designation, and Augustus J. Ricks, U. S. district judge.

THE MERCANTILE NATIONAL BANK
*vs.*
R. S. HUBBARD, Treas'r, etc. } 5714. Chancery.

On hearing in open court and good cause having been shown after notice to the defendant, leave is granted to the plaintiff on its motion to withdraw the depositions taken on its behalf at Elyria, Lorain county, Ohio.

41

*Order of Continuance.*

October Term, A. D. 1898, to wit, February 6th, A. D. 1899.

Present: The Honorable E. S. Hammond, U. S. district judge, sitting by designation, and Augustus J. Ricks, U. S. district judge.

MERCANTILE NATIONAL BANK
*vs.*
R. S. HUBBARD, Tr. } 5714. Chancery.

This cause is continued to the next term of this court.

*Order of Continuance.*

February Term, A. D. 1899, to wit, April 3rd, A. D. 1899.

Present: The Honorable Augustus J. Ricks, U. S. district judge.

MERCANTILE NATIONAL BANK
*vs.*
R. S. HUBBARD, Tr. } 5714. Chancery.

This cause is continued to the next term of this court.

*Order of Continuance.*

April Term, A. D. 1899, to wit, August 14th, A. D. 1899.

Present: The Honorable Horace H. Lurton, U. S. circuit judge.

MERCANTILE NATIONAL BANK *vs.* R. S. HUBBARD, Treas'r. } 5714. Chancery.

This cause is continued to the next term of this court.

42 *Report of Special Master.*

In the Circuit Court of the United States, Northern District of Ohio. Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Ohio, Complainant, *vs.* R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Respondent. } No. 5714. Report of Special Master.

The undersigned, heretofore appointed by this court as special master in this cause, begs to report to this honorable court that he has examined the pleadings filed in this cause and the testimony heretofore taken herein, and has heard the arguments of counsel for the complainant and respondent and now comes and makes the following report, to wit:

*Findings of Facts.*

First. That the complainant, The Mercantile National Bank of Cleveland, Ohio, is a national banking association, organized under the laws of the United States, and engaged in such banking business in the city of Cleveland, Ohio.

Second. That the auditor of State, prior to the year 1897, had prepared and transmitted to the auditors of the several counties in the State a form of return to be used by banks or banking associations organized under the laws of the State of Ohio, or of the United States, upon which said banks were required to make their return or report under oath required by section 2765 of the Revised Statutes of Ohio. That in said form so prepared the following instructions were incorporated: "You are also required to accompany this return with a copy of the report to the Comptroller of the Currency made next prior to the second Monday of May, 1897."

That said blank form of report was by the auditor of Cuyahoga county sent to each national bank in said county, including complainant bank.

Third. That on the 15th day of June 1897, the cashier of the complainant made a report in duplicate to the auditor of the county of Cuyahoga on said blanks, purporting to show the resources and lia-

bilities of said banking association, at the close of business on
43 the Wednesday next preceding the second Monday of May, 1897, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and that said report was sworn to by the cashier of said complainant on the 8th day of June, 1897; said report contained a statement that the said complainant had at that time a capital stock of one million dollars, fully subscribed and paid up, and that it had a surplus and undivided profit amounting to $174,541.49; and that said capital stock was divided into ten thousand shares of $100.00 each; that the value of the complainant's real estate, furniture and fixtures was $300,000, and that its current expenses and taxes paid were $9,328.52.

Fourth. That said report was accompanied by a copy of the report to the Comptroller of the Currency made next prior to the making of said report and the same was filed with the auditor of said county.

Said report so made to the Comptroller of the Currency was made by the cashier of said complainant bank, on the 14th day of May, 1897, and was sworn to by the cashier of said bank, and verified by three of the directors thereof, as required by law. Said report contained the statement that the capital stock of said complainant's bank, paid in, amounted to $1,000,000, its surplus fund $200,000, and that its undivided profits amounted to $89,413.87, and that its banking-house, furniture and fixtures were of the amount and value of $255,000. Said report was a statement of the condition of the bank as shown by its books on that day, and made no allowances or deductions on account of doubtful assets.

Fifth. The county auditor when he noticed a discrepancy between the report made to the Comptroller of the Currency and the report made to the auditor for taxation, called the attention of the cashier of said bank to the discrepancy and the cashier appeared before him in person and thereafter the auditor fixed the total value of the shares of complainant's bank at $636,690, and deducted from that aggregate sum the value of the real estate as the same then stood on the tax duplicate, amounting to $117,370.00, leaving the total value of shares of complainant's bank exclusive of real estate as fixed by the auditor at $519,320.

The master finds that the actual method of determining said value by the auditor aforesaid was that of taking the sum of the par value of the capital stock, and the surplus and undivided profits as reported, less a certain sum for bad paper, and deducting there-
44 from the reported value of real estate and taking 60 per cent. of the remainder thereof as the taxable value, as shown below:

| | |
|---|---|
| Value of capital stock..... | 1,000,000.00 |
| Surplus and undivided profits..... | 174,540.00 |
| | 1,174,540.00 |
| Real estate, etc., deducted..... | 309,000.00 |
| | 865,540.00 |
| | 60 per cent. |
| | $519,324.00 |
| The value fixed by the auditor..... | $636,690.00 |
| Being fixed so that a deduction of the real estate as it stands on the duplicate, viz..... | 117,370.00 |
| Would leave about the same balance, viz..... | $519,320.00 |

Sixth. Said county auditor made out and transmitted to the annual State board of equalization for incorporated banks, a copy of the report so made by the cashier of complainant bank, together with the valuation of such shares as so fixed by him, on the 19th day of July, 1897. There was attached to said report a copy of the report of the Mercantile National Bank of Cleveland, Ohio, to the Comptroller of the Currency made next prior to the second Monday of May, 1897, to wit, May 14, 1897.

Seventh. That the said board of equalization for incorporated banks composed of the governor, auditor of State and attorney general, convened on the third Tuesday, being the 15th day of June, 1897, at the office of the State auditor, as required by section 2808, Revised Statutes of Ohio, and organized by the election of the governor as president of the board and G. W. Taylor, chief clerk in the office of the auditor of State, as secretary, and adjourned at the call of the secretary, transacting no other business at that meeting; that the members composing said board next met on the 7th of September, 1897, but took no action relating to the valuation of the shares of the plaintiff, and adjourned; that two members of said board with said secretary met on the 10th day of September, 1897, but took no action relating to the shares of the plaintiff bank, and adjourned; that on the 20th day of September, 1897, the members of said
45 board met but took no action relating to the valuation of the shares of plaintiff and adjourned; that on the 4th day of December, 1897, the members of said board next met at the call of the State auditor to consider unfinished business. The record of the meetings of said board as originally made by the secretary shows that at the meeting held June 15, 1897, the board "adjourned to meet at the call of the secretary." That at the meetings of September 7, 1897, September 10, 1897, September 20, 1897, the "board adjourned." At the meeting held December 4, 1897, the secretary was directed to amend the record as to each of said above-named adjournments by adding these words: "Amended to read, 'adjourned to meet at the call of the president of the board, Asa S. Bushnell, governor of the State,'" and thereupon said board adjourned *sine die*.

Some time after December 4, 1897, the record was amended by the secretary as directed by said board. At none of said adjournments was a day named for the next meeting.

Eighth. At said meeting on December 4, 1897, without complaint from any one, the members of said board assuming to act as a board, increased the valuation of the shares of the plaintiff from $519,320.00, so fixed by the county auditor, to $642,320.00, and on the 6th day of December certified said valuation to the auditor of Cuyahoga county to be by him placed on the treasurer's duplicate, which was accordingly done; that neither of said meetings of the members of said board following the third Tuesday of June, 1897, was called by said secretary and no notice or information of any kind or opportunity to be heard was given by said board, its secretary or any other person to said bank or any of its officers, directors or shareholders of any or either of said meetings, except such as the statute gave them, to wit: section 2808 Revised Statutes and succeeding sections; nor did they or either of them have any notice of any of said meetings or appear thereat, and the first information that said bank or any of its shareholders had or received of any action of the board or of the purpose to increase the value of the shares so fixed by the auditor was on the 7th day of December, 1897, after the action of the board was had and such information was conveyed by letter from the auditor of the county to the cashier of the plaintiff, notifying him of the completed action of the board; that thereupon said bank and its shareholders through the officers and agents of the bank duly authorized, applied to the members of said board for a hearing, and *was* notified that two of the members of said
46 board were out of the State and that December 28th was as early as the bank officers could be received; that on said day the officers of said bank on behalf of said shareholders duly authorized, met the members of said board at Columbus, and made application for a hearing respecting the valuation of said shares and the action of said board, and notified said members of said board that such increase made on the shares of said bank was excessive and unwarranted and protested against the same, but said hearing was denied, the members of said board declaring that the board had adjourned *sine die* and could not reconvene as a State board of equalization for banks to consider any claim or application respecting the value of said shares.

At the time the persons who had composed the State board of equalization for banks and who are the same persons required to act under section 167 of the Revised Statutes of Ohio offered to convene and organize under said section 167 to consider the case of the various plaintiff banks at such time as might be convenient for the representatives of the Cleveland banks to appear. Some doubt was expressed by some of the members of the committee that the board would not have the power under section 167 to afford as full relief as the board of equalization and only one of the Cleveland banks appeared before the board when organized under section 167, viz., the First national bank, the others declined to appear.

Ninth. That the said auditor of said county of Cuyahoga upon

the receipt of the certificate from said State board of equalization entered said valuation of $642,820.00 upon the tax duplicate of said county for the year 1897, and assessed against the same taxes at the rate of 3.03 cents on each dollar, and which amounted on said valuation to $19,462.30. The taxes on said bank shares at the said rate of 3.03 — on each dollars, if assessed on the valuation of $519,320, as fixed by the auditor of Cuyahoga county would have amounted to the sum of $15,735.39.

Tenth. That at the time the cashier of the complainant bank made its report to the auditor of Cuyahoga county, Ohio, for the year 1897, the following-named persons were stockholders of the complainant, owning and holding the number of shares set opposite their respective names, to wit:

| | | |
|---|---|---|
| | Edwin R. Perkins | 530 shares |
| | Edwin R. Perkins, as executor of the last will and testament of T. P. Handy | 400 shares |
| | Samuel E. Williamson | 50 shares |
| 47 | W. G. Mather | 70 shares |
| | W. S. Tyler | 250 shares |
| | Orville L. Jones | 30 shares |
| | A. L. Withington | 30 shares |
| | William Bingham | 150 shares |
| | James Barnett | 400 shares |

Eleventh. That each of said stockholders was on said tax day indebted and owing of legal, *bona fide* debts of the kind which the statute of Ohio permits to be deducted from credits a sum in excess of all credits from which, under the laws of the State of Ohio, he was entitled to deduct said debts to an amount equal to the par value of the number of shares specified opposite their respective names in the following list, to wit:

| | |
|---|---|
| Edwin R. Perkins | 254 shares |
| Edwin R. Perkins, as executor of the last will and testament of T. P. Handy | 400 shares |
| Samuel E. Williamson | 50 shares |
| W. G. Mather | 70 shares |
| W. S. Tyler | 250 shares |
| Orville L. Jones | 30 shares |
| A. L. Withington | 30 shares |
| William Bingham | 150 shares |
| James Barnett | 245 shares |

Proof of said indebtedness was by them made to the auditor of said county accompanying the return made by the cashier of the plaintiff in 1897, and a deduction thereof from the assessed value of the shares so owned by them was then claimed.

Twelfth. That in the affidavits showing such indebtedness said stockholders respectively set forth the following as the amount of their legal, *bona fide* debts, over and above all their credits, to wit:

| | |
|---|---|
| Edwin R. Perkins | $32,500.00 |
| Estate of Truman P. Handy | 50,000.00 |
| S. E. Williamson | 5,000.00 |
| W. G. Mather | 7,000.00 |
| James Barnett | 31,333.00 |
| W. S. Tyler | 25,000.00 |
| Orville L. Jones | 6,200.00 |
| A. L. Withington | 3,000.00 |
| William Bingham | 15,000.00 |

48 Thirteenth. The master finds that their respective excess of indebtedness at that time was in fact, as follows:

| | |
|---|---|
| E. R. Perkins | $32,500 |
| E. R. Perkins, as executor | 86,000 |
| S. E. Williamson | 32,000 |
| W. G. Mather | 19,000 |
| James Barnett | 31,333 |
| W. S. Tyler | 45,000 |
| Orville L. Jones | 28,000 |
| A. L. Withington | 17,500 |
| William Bingham | 116,000 |

Fourteenth. The master further finds and reports the following facts appearing from the testimony taken herein, to wit:

The cashier of the Mercantile National Bank of Cleveland, on the 23 day of July, 1897, made a report to the Comptroller of the Currency of the condition of said bank which was attested by three directors of said bank, which said report contained the statement to said comptroller that the capital stock of said complainant's bank paid in, amounted to $1,000,000.00, its surplus fund $200,000.00, undivided profits $94,254.77.

That the semi-annual report of earnings and dividends of said bank made to the Comptroller of the Currency, and verified by the cashier thereof for the six months ending October 31st, 1896, was as follows:

| | | | |
|---|---|---|---|
| Losses sustained | | Gross earnings | $74,543 72 |
| Expenses and taxes paid | $40,906 67 | Other profits | 554 66 |
| Net earnings | 34,191 71 | | |
| | $75,098 38 | | $75,098 38 |
| Dividend of 3 per cent. on $1,000,000 | $30,000 00 | Net earnings for six months | $34,191 71 |
| Amount net profits carried forward | 99,616 55 | Undivided profits from last report | 95,424 84 |
| | $129,616 55 | | $129,616 55 |
| Total surplus | $200,000 00 | Total profits since organization | $989,616 55 |
| Total dividends | $690,000 00 | | |
| Total other profits on hand | | | $989,616 55 |

Fifteenth. That the semi-annual report of earnings and dividends of said bank made to the Comptroller of the Currency, and verified

by the cashier thereof for the six months ending May 1st, 1897, was as follows:

| | | | |
|---|---|---|---|
| Losses sustained | | Gross earnings | $68,558 44 |
| Expenses and taxes paid | $43,524 93 | Other profits | |
| Net earnings | 25,033 51 | | |
| | $68,558 44 | | $68,558 44 |
| 49 Dividend of 3 per cent. on $1,000,000 | $30,000 00 | Net earnings for six months. | $25,033 51 |
| Amount net profits carried forward | 94,650 06 | Undivided profits from last report | 99,616 55 |
| | $124,650 06 | | $124,650 06 |
| Total surplus | $200,000 00 | Total profits since organization | $1,014,650 06 |
| Total dividends | 720,000 00 | | |
| Total other profits on hand. | 94,650 06 | | |
| | $1,014,650 06 | | $1,014,650 06 |

Sixteenth. That the semi-annual report of earnings and dividends of said bank made to the Comptroller of the Currency, and verified by the cashier thereof, for the six months ending October 31st, 1897, was as follows:

| | | | |
|---|---|---|---|
| Losses sustained | | Gross earnings | $61,543 21 |
| Expenses and taxes paid | $47,392 94 | Other profits | |
| Net earnings | 20,150 27 | | |
| | $61,543 21 | | $61,543 21 |
| Dividend of 3 per cent. on $1,000,000 | 30,000 00 | Net earnings for six months. | $20,150 27 |
| Amount net profits carried forward | 84,800 33 | Undivided profits from last report | 94,650 06 |
| | $114,800 33 | | $114,800 33 |
| Total surplus | $200,000 00 | Total profits since organization | $1,034,800 33 |
| Total dividends | 750,000 00 | | |
| Total other profits on hand. | 84,800 33 | | |
| | $1,034,800 33 | | $1,034,800 33 |

And it appears from the census report of 1890, that in Ohio there were real-estate mortgage debts in force amounting to $259,842,188. And in Cuyahoga county, Ohio, alone $21,795,654, apportioned as follows:

| | |
|---|---|
| On acre property | $2,806,468 |
| On lots | 18,989,186 |

But there is nothing in these reports or in the evidence elsewhere to show what portion of credits consists of moneyed capital in the hands of individuals which in fact enters into competition for business with national banks. Nor is there any evidence as to what the total moneyed capital in the hands of individual citizens and included in the term credits amounts to. The master is therefore unable to ascertain or report what proportion the moneyed capital of

individual citizens included in the term credits, bears to the amount invested in national bank shares, and he is unable to report whether there has or has not been any material discrimination such as the Federal statute was enacted to prevent, against said complainant and in favor of other moneyed capital in the State outside of
50 Cuyahoga county. I find, however, the fact to be, that in said year a large amount of moneyed capital in the hands of individual citizens of the State invested in promissory notes and other obligations and credits, was, by section 2730 of the Revised Statutes of Ohio, authorized to be exempted from taxation through the deduction therefrom of legal *bona fide* debts.

There is nothing in the evidence that will show whether shares of incorporated banks in the counties of the State outside of Cuyahoga county were valued for taxation by the auditors at a higher or lower percentage compared with the true value in money of their stocks than were the banks in Cuyahoga county, and hence the master is unable to report or find whether there was any unjust discrimination as between other incorporated banks and the complainant bank, and against the complainant bank.

An examination of the valuation of shares of banks as returned to and fixed by the State board of equalization of bank shares for 1897, discloses the fact that:

The assessed valuation of shares of all incorporated banks in the State of Ohio, in the year 1897, exclusive of real estate, as fixed by the State board of equalization was 61⅞ per cent. of the aggregate capital stock, surplus and undivided profits of such incorporated banks.

That the assessed valuation of all national bank shares in Ohio, in 1897, exclusive of real estate as fixed by the county auditors of the State was 58.5 per cent. of the aggregate capital stock, surplus and undivided profits as reported to said auditors. Which said valuation was increased by the State board of equalization to about 59.5 per cent. of the said aggregate value of said capital stock, surplus and undivided profits an increase of 1.6 per cent. on the valuation fixed by the auditor.

That the assessed valuation of national bank shares in the State of Ohio for the year 1897, outside of Cuyahoga county, exclusive of real estate as fixed by the county auditors of the State was 58.9 per cent. of the aggregate capital stock, surplus and undivided profits as reported to such county auditors. Which said valuation was decreased by the State board of equalization to 57.7 per cent. of said aggregate value of said capital stock, surplus and undivided profits, being a decrease of a little more than two per cent.

That the assessed valuation of the national bank shares in Cuyahoga county, in 1897, exclusive of real estate, as fixed by the county auditor, was 56.4 per cent. of the aggregate of the capital
51 stock, surplus and undivided profits as reported to the auditor which said valuation was increased by the State board of equalization to 67.8 per cent. of the capital stock, surplus and undivided profits of said banks, being an increase of a little more than

20.2 per cent. of valuation. While the increase of shares of stock of the complainant bank was a little more than 23.6 per cent.

I find that moneyed capital in the hands of individual citizens of the city of Cleveland and the county of Cuyahoga was assessed for taxation by the assessing officers of the county in the year 1897, and for a long time theretofore as nearly as practicable at sixty per cent. of its value. And that as compared with other moneyed capital in said county the value fixed by the auditor on the stocks of said bank for the purposes of taxation was fair and equitable. And I also find that the valuation placed upon the shares of complainant bank by the State board of equalization was much higher than that fixed on other moneyed capital in the hands of individual citizens and corporations in the county of Cuyahoga and city of Cleveland, and that such action of the board of equalization was an unjust discrimination against said complainants.

Eighteenth. By stipulation signed by the parties to said cause it was agreed that if the court holds it competent to put in proof of taxation of moneyed capital and bank shares, outside of Cuyahoga county, that there is no discrimination for counties outside of the county of Cuyahoga, in the State of Ohio, by the taxing officers of said counties in fixing the valuations for the purposes of taxation upon moneyed capital as against shares in incorporated banks.

Nineteenth. I find that on the day said statement was filed with the auditor the actual cash value of the shares of stock in complainant's bank was $128.00 per share, and that the value of the real estate of said bank as it then stood upon the tax duplicate was $117,370.

Twentieth. I find that heretofore, to wit, on the 17th day of December, 1885, an action was commenced in this court by the complainant herein, against Horatio N. Whitbeck, the predecessor of the defendant, as treasurer of Cuyahoga county, to enjoin the collection of taxes assessed against the shares of complainant's stock, growing out of the refusal of the taxing officers of said county to allow the deduction of *bona fide* debts of individual stockholders, from the assessed value of their shares. Which said action proceeded to final decree in this court. Said cause was numbered 4411.

52 The following is a true copy of the record of said cause, to and including the decree therein, now in full force, to wit:

October Term, 1886.

No. 4411. At a stated term of the circuit court of the United States for the eastern division of the northern district of Ohio, begun and held in the city of Cleveland in said district on the first Tuesday in October, being the fifth day of said month in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States of America the one hundred and tenth.

Present: The Honorable Howell E. Jackson, circuit judge, and the Honorable Martin Welker, district judge.

In the record and proceedings of said court then and there held, among other things appeared the following, to wit:

THE MERCANTILE NATIONAL BANK OF CLEVELAND
*vs.*
HORATIO N. WHITBECK, Treasurer of Cuyahoga County, Ohio.

*Bill.*

Be it remembered that heretofore, to wit, on the 17th day of December, A. D. 1885, there was filed in the clerk's office of said court the following bill of complaint in the above-entitled cause, which bill is in the words and figures, to wit:

In the Circuit Court of the United States of America within and for the Northern District of Ohio, Eastern Division, *ss:*

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, Complainant,
*vs.*
HORATIO N. WHITBECK, Treasurer of Cuyahoga County, Ohio, Defendant.
} Bill.

To the honorable the judges of the circuit court of the United States for the northern district of Ohio, eastern division:

Your orator, The Mercantile National Bank of Cleveland,
53 Ohio, respectfully represents that it is a national banking association incorporated under and by virtue of the act of Congress entitled "An act to provide for a national currency secured by the pledge of United States bonds, and to provide for the circulation and redemption thereof." Approved June 3rd, 1864, and the amendments thereof, and is established and doing business in the city of Cleveland in said northern district of Ohio, and brings this, its bill of complaint, against Horatio N. Whitbeck, treasurer of Cuyahoga county, Ohio, a resident of said city of Cleveland, Ohio, and a citizen of Ohio and of said northern district, eastern division; and the grievance herein complained of arises and is exclusively founded on a violation by the defendant and others, whose unlawful acts he is carrying into effect, of rights of the shareholders of said national bank accorded them by section 5219 of the Revised Statutes of the United States — secured to said shareholders a restriction upon the taxation of the shares of stock of said bank by State authority, to that rate and limit assessed upon other moneyed capital in the hands of individual citizens of the State, as will herein fully appear.

And, thereupon, your orator complains and says that it has a capital stock of 1,000,000 dollars divided into ten thousand shares of one hundred dollars each, all of which is paid up, and certificates for the shares outstanding and owned by a large number of persons, some of whom are now residents of the said State of Ohio and citizens of other States; that, in accordance with section 2765 of the Revised Statutes of the State of Ohio, then in force, the cashier of your orator duly reported, in duplicate, to the auditor of said county, the resources and liabilities of said banking association at the close

of business on the Wednesday next preceding the second Monday in May, 1885, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and the par value of each share, as required by said section 2765; that, included in said return so made by said cashier, was the real estate owned by your orator at a valuation of $163,060.00, which was already valued and equalized in conjunction with all the other real estate in the city of Cleveland by the proper board of equalization at a taxable value of $163,060.00 which tax on said real estate so valued in said return at the sum of $163,060.00, being the sum paid by said bank therefor—is otherwise and separately assessed and charged on the tax duplicate of said county, and paid by this complainant to the treasurer of said county aside from the taxes set forth in this bill.

54 That thereupon, the said auditor pretended to proceed as required by section 2766 of the Revised Statutes of Ohio, as amended March 9th, 1883, to fix the total value of such shares according to their true value in money and fixed the same at $444,820.00 exclusive of the assessed value of its real estate; and made out and transmitted to the annual State board of equalization for incorporated banks, a copy of the report so made by said cashier, together with the valuation of such shares as so fixed by said auditor; and your orator, from information and belief, alleges that the said county auditor, for the purpose of more accurately determining and fixing the value of said shares, did meet with and consult the board of equalization for the city of Cleveland, and the valuation by him reported to the State board of equalization was fixed and determined upon by said auditor with the assistance and approval of said city board of equalization; that it is by law, the duty of said city board of equalization to value and equalize for taxation all moneyed capital and personal property of every kind in the hands of individual citizens of the State of Ohio, resident in said city, except only the capital, assets and shares of incorporated banks, that being the only property under the statute aforesaid referred to said State board of equalization to be equalized.

That said auditor placed a value upon said shares which was, in fact, and was known by him to be far in excess of the value fixed in said county on other moneyed capital in the hands of individual citizens of the State of Ohio, and of said city and county. That the said State board of equalization assuming and pretending to comply with the requirements of section 2808 and 2809 of the said Revised Statutes as amended March 9, 1883, did examine the return aforesaid made by said cashier to said county auditor, and the value of such shares as fixed by said county auditor; but that said State board of equalization did not examine as required by law, any other returns made by said county auditor to the State auditor, and the said board did then pretend to equalize said shares to their true value in money, and fixed the valuation thereof at $495,774.76 exclusive of the assessed value of its real estate.

That said State board of equalization, so called, knowingly and designedly did fix a much higher per cent. of value and assessment

for taxation upon the capital stock and shares of your orator than upon the capital and shares of other banks organized and existing under the laws of the State of Ohio, and which they pre-
55 tended to equalize, a much higher rate and per cent. than was assessed upon other moneyed capital in the hands of citizens of the State of Ohio and much higher than that fixed upon other moneyed capital in the hands of such citizens in the said county of Cuyahoga and city of Cleveland. That about four-fifths of the taxes assessed in said city of Cleveland and upon the stockholders of your orators upon their shares, in said bank, are assessed and paid for the purposes and are of the said city of Cleveland, and about one-tenth for the purposes and are of the said county of Cuyahoga, and only about one-tenth for the purposes and are of the State of Ohio. That said State board of equalization did not equalize the value of said shares with the value of shares in other banks or with the values of other moneyed capital in the hands of citizens of the State of Ohio, county and city, but designedly and intentionally placed a much higher value thereon, which valuation so purposely equalized and determined by said State board of equalization, the auditor of said State did certify to the said auditor of Cuyahoga county, which valuation so certified the said county auditor did enter upon the tax duplicate of said county for the year 1885.

That, afterward, said county auditor did enter upon the tax duplicate of said county for the year 1885 against your orator, a tax on such valuation of such shares for the year 1885 amounting in the aggregate to $12,890.15 and upon a valuation as aforesaid of such shares of $495,774.76 exclusive of the assessed value of its real estate.

That a large part of the capital stock of your orator is invested in the obligations and securities of the United States, and in the lawful money thereof, and that said tax so levied and assessed, was and is, in violation of law unauthorized and void. That the said tax was levied on a valuation 11.455 per cent. higher than that fixed by the county auditor aforesaid and about four-fifths thereof for the city of Cleveland, to answer the various purposes of that municipal body. That said duplicate as required by law, with the said taxes charged thereon, has been by said county auditor delivered to said Horatio N. Whitbeck, treasurer of said county of Cuyahoga, to be by him collected from your orator by distraint, attachment or other legal proceedings as provided in said statutes, who will immediately proceed to enforce the collection thereof, either by sacrifice of such shares by enforcing the lien thereon created by said statutes, or otherwise, unless restrained by the injunction of this honorable court. And your orator further
56 represents and shows unto your honors that in and by the second section of the twelfth article of the constitution of said State, it is provided that "laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, and also all real and personal property according to its true value in money," and in and by the third section of the same article that "all property employed in banking

shall always bear a burden of taxation equal to that imposed on the property of individuals," and by the fourth section of the thirteenth article, it is further provided that "the property of corporations now existing or hereafter created shall forever be subject to taxation the same as the property of individuals." And in and by the act of Congress under which your orator is incorporated the right of the State to tax any owner of its shares is made subject to this condition, "that the taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such State."

Your orator further avers that by section 2730 of the Revised Statutes of Ohio, it is enacted that the term "credits" shall be held to mean the "excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due to, or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this State, other than such as are held to be money as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money) over and above the sum of legal *bona fide* debts owing by such person;" and by section 2736 of the Revised Statutes of Ohio, it is provided that every person required to list property for taxation shall deliver to the assessor annually a statement of all personal property, money and "credits" and other property in his possession or under his control on the day preceding the second Monday of April of that year, which he is required to list for taxation; and by section 2737 it is provided that such statement, among other things, shall truly set forth the amount of "credits" possessed by such person as that term is by the above-recited statute defined. Your orator says that a large amount of moneyed capital in the hands of individuals invested in promissory notes and other obligations and credits is by the aforesaid provision allowing deduction of legal *bona fide* debts to be made therefrom, expressly exempted from taxation, thereby making an unjust and unlawful discrimination against moneyed capital invested in national bank shares, as to which no
57 exemption or deduction is provided for by the laws of the State, which discrimination is in direct violation of the restrictions of said section 5219 of the Revised Statutes of the United States. Your orator further avers that the following-named stockholders of said bank were, on the said day, next preceding the second Monday of April, A. D. 1885, the owners and thence until now have owned and still continue to own, the numbers of shares of the stock of said bank set opposite their respective names, viz:

| | |
|---|---|
| T. P. Handy | 600 |
| S. Chamberlain | 500 |
| R. L. Chamberlain | 100 |
| W. Bingham | 150 |
| S. L. Mather | 400 |
| James Barnett | 400 |
| Amos Townsend | 240 |

L. A. Murfry..... 500
C. L. Murfry..... 50
E. R. Perkins..... 530
James Parmolee..... 70

And at the day last named and at the time the cashier of said banking association made return to the auditor of Cuyahoga county, Ohio, of the names and residences of the shareholders of said association with the number and par value of the shares of the capital stock of said banking association for the year 1885, to wit, between the first and second Mondays of May, of said year, each of said above-named stockholders was indebted and owing to others of legal *bona fide* debts a sum in excess of the credits from which under the laws of Ohio he was entitled to deduct said debts, to an amount equal to the value of said shares except said E. R. Perkins and said C. L. Murfry, the excess of whose debts over the credits which by the laws of Ohio they were entitled to deduct from their credits equal- in the case of said Perkins the value of 320 of his said shares and in the case of said Murfry the value of 25 of his said shares, which said excess of said debts over credits as aforesaid, should be deducted from the assessed value of said shares, so owned by him, and by reason of the facts above stated said shares of said stock should not have been placed on the tax duplicate, and no tax should have been assessed thereon. And your orator alleges that neither of the above-named shareholders listed any of said shares for taxation nor did either authorize any one to list them for him.

58 That at the time of the return and statement to the auditor of Cuyahoga county as above stated, neither said bank or said cashier had knowledge of the fact that the shareholders above named were indebted as aforesaid and no opportunity was given them, or either of them, nor was any provision therefor made by law, to deduct from the value of said shares so owned by them the amount of said indebtedness, or to demand the right so to do, or demand that the same should be done, but your orator alleges that on the 17th day of December, A. D. 1885, and before the tax assessed on said shares became due and payable each of said shareholders, and your orator, made due and legal showing and proof to said auditor of Cuyahoga county, when said return was made and to said respondent of the existence of the said indebtedness and demanded that the same should be deducted from the assessed value of the shares owned by him and returned by your orator, but both the respondent and said auditor refused to make said deductions and insisted that the whole of said shares as then assessed should remain upon the tax duplicate and insisted upon the payment of the whole of the tax as assessed thereon. And your orator insists that by reason of the premises above set forth, there should be deducted from the shares of the capital stock owned by said shareholders above named, and now standing on the tax duplicate of said county $285,500 par value of the shares of said stock, in all the sum of $141,543.48 according to the assessed value thereof. And your orator further represents that on the 17th day of December, A. D.

1885, on behalf of the shareholders owning said shares, it duly tendered to said treasurer and offered to pay for the taxes due December 20th, 1885, on said shares the sum of $3,942.59 and is still ready and willing to pay the same, as well as the other half, on the same basis of valuation, in manner and at the times provided by law for the payment of taxes, to wit, on or before the 10th of June, A. D. 1886, if the treasurer will receive it or the court so orders; but said treasurer has so far refused to receive said payment unless your orator would also pay the whole amount of said tax as it stands on the duplicate. Your orator avers and insists that the taxes so levied and assessed against it on account of its said shares of stock are unjust, illegal and void for the following among other reasons:

1st. That said tax is levied and assessed against your orator directly, and is in violation of the act of Congress under which your orator is incorporated.

2nd. That the laws of Ohio authorize and permit the
59 owner of credits to deduct therefrom all debts owing by him and requires him to list for taxation only the excess of credits over his indebtedness, and that such is the uniform practice throughout the State, and that under the laws of the same State the owner of capital stock of your orator is denied the right to deduct therefrom his indebtedness, but is required to list for taxation the whole number of shares owned by him and not simply the excess of the value of said shares over his indebtedness, and your orator insists that such discrimination results in the taxation of your orator's stock at a much greater rate than is assessed upon other moneyed capital in the hands of individual citizens of Ohio.

3rd. Their property in this corporation is not valued and taxed the same as the property of individuals, and the burden of taxation upon it is very much greater, nor has any equality been preserved in the valuation of the shares for taxation as compared with other property in the locality where your orator is established; on the contrary, the valuation in proportion to the value is fully twice as much as that fixed on other property, while the rate of levy is the same.

4th. The proceedings of said State board of equalization were irregular, illegal and of no binding obligation, for, while the said act proposes to give authority to examine and equalize the value of such shares as fixed by the county auditor and as reported by him to the State auditor, yet the said board did in fact examine and equalize as aforesaid, and not otherwise, the values of such shares fixed by the county auditor and determined by him, to the State board of equalization; which value, so fixed and returned, the said State board were not authorized by law to examine, equalize, or in any manner meddle with. While said act proposes to give authority to hear complaints and to equalize the value of said shares as fixed by the county auditor, not increasing the aggregate more than 20 per cent. of such valuation, yet your orator avers that said board has proceeded without any complaint made against the valuation made by said auditor and without any notice to your orator, or the other

national banks located in said city and county, or the shareholders thereof, to increase arbitrarily the valuation for taxation more than five hundred thousand dollars, upon your orator, and upon other national banks of the said city and upon the shareholders thereof without any hearing or any opportunity for hearing, as is fairly required by said act.

5th. That the taxation of the shares of your orator's stock, as aforesaid, is at a greater rate than is assessed upon other
60 moneyed capital in the hands of individual citizens of Ohio.

6th. The necessary effect of the proceedings had in the assessment and levy of the taxes standing against your orator and the share- thereof owned by its said shareholders has been to deprive your orator and such shareholders, both in the manner of valuation and equalization, of all benefit of the constitution and general laws of the State, by which only uniformity in the burdens of taxation upon all description of property could be secured to take from them the security afforded by the limitations of the acts of Congress and to impose upon them such excessive exactions as to make the franchise granted by said act comparatively valueless.

And your orator further represents that if the shares of said stockholders are permitted to be sold under the lien created on them by section 2839 of the said Revised Statutes of Ohio, or otherwise, irreparable injury would not only be done to each of the shareholders, but also to your orator; and it would thereby be subjected to great loss of standing and credit and other injuries, for the redress of which the law affords no remedies, and the franchises with which your orator is invested by the act of Congress aforesaid, would not only be greatly impaired in value, but if such illegal exactions are to continue and be persisted in, would be rendered nearly useless; that the disability imposed upon your orator to make transfers or pay dividends of or upon shares upon which such illegal tax remains unpaid would damage all the ordinary business of your orator and introduce confusion and uncertainty into its transactions, and the consequent loss of public confidence upon which its success depends; or, if your orator should pay such illegal tax and attempt to deduct the amount from dividends or other funds of the shareholders in its hands—which many of its shareholders have already prohibited its doing—it would be subjected to a great multiplicity of suits, brought by its separate shareholders for so doing; and, in any event, a great number of suits would be rendered necessary to adjust the rights of all the parties and your orator would be subjected to great expense and irreparable injury thereby.

Inasmuch, therefore, as your orator is remediless by the strict rules of the common law, and relievable only in equity, it prays that said Horatio N. Whitbeck, treasurer of said Cuyahoga county, may be made party defendant to this bill of complaint; that the writ of subpœna may issue against him, and that he may an-
61 swer the premises; that your honors will grant unto your orator your writ of injunction strictly restraining and enjoining during the pendency of this suit the said Horatio N. Whitbeck treasurer of said Cuyahoga county, as aforesaid, from collecting or

attempting to collect from your orator, or said individual stockholders, by distraint or otherwise, any of the said taxes as the same stand charged on the said duplicate, and that upon the final hearing thereof, the said tax may be declared and decreed wholly illegal and void; or, if your honor should consider your orator not entitled to the relief aforesaid, that the said respondent may be decreed to receive in full of said taxes the sum so tendered by your orator, and *he* perpetually enjoined from collecting or attempting to collect the balance of said taxes so illegally assessed, and for such other and further relief in the premises as equity and good conscience require.

BOYNTON & HALE,
*Solicitors for Complainant.*

UNITED STATES OF AMERICA, }
*Northern District of Ohio.* }

Be it remembered, that on this 17th day of December, 1885, personally came before me C. L. Murfry, who, being by me duly sworn, deposes and says that he is the cashier of the complainant in the foregoing bill of complaint; that he has heard the same read and knows the contents thereof; that all the allegations and statements therein contained as derived from the information of others, he believes to be true, and all other allegations and statements therein made are true in substance and in fact.

C. L. MURFRY, *C'r.*

Sworn to before me and signed in my presence, the 17th day of December, 1885.

NORTON T. HORR,
*Notary Public in and for Cuyahoga County,*
*State of Ohio.* [SEAL.]

*Subpœna.*

And afterwards, to wit, on the 18th day of December, A. D. 1885, the following subpœna was filed in this cause in said court, viz:

UNITED STATES OF AMERICA, }
*Northern District of Ohio, Eastern Division,* } *ss:*

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon Horatio N. Whit-
62 beck, treasurer of Cuyahoga county, Ohio, if he may be found in your district, to appear in the circuit court of the United States, within and for the district aforesaid at Cleveland, on the first Monday in March next, to answer a certain bill in chancery filed and exhibited in the said court against him by the Mercantile National Bank of Cleveland, Ohio. Whereof he is not to fail under the penalty of the law thence ensuing, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the

United States, this 17th day of December, A. D. 1885, and in the 110th year of the Independence of the United States of America.

A. J. RICKS, *Clerk*,
By O. C. BEATTY, *Deputy Clerk*. [SEAL.]

*Memorandum.*

The said defendant is required to enter his appearance in the suit in the clerk's office of said court on or before the first Monday of February, 1886, otherwise the said bill may be taken *pro confesso*.

A. J. RICKS, *Clerk*.

NORTHERN DISTRICT OF OHIO, *ss*:

On the 18th day of December, 1885, I made due service of this writ, by delivering a true and duly certified copy thereof to H. N. Whitbeck, treasurer of Cuyahoga county.

W. T. GOODSPEED,
*U. S. Marshal*.

(Indorsed:) Returnable February 1st, 1886. Rule day for appearance, February 1st, 1886. Rule day for answer, March 1st, 1886. Returned and filed December 18th, 1885. A. J. Ricks, clerk.

And afterwards, to wit, on the 18th day of December, A. D. 1885, being a day of the October term, A. D. 1885, of said court, the following order was filed in this cause in said court, viz:

*Restraining Order.*

This day came the complainant, and came also the defendant, by counsel, and the motion for an injunction as prayed for came on for hearing, and the court being fully advised in the premises,
63 do order that the defendant be and he is hereby enjoined and restrained prior to the final hearing and further order of this court in the premises from collecting the excessive taxes and assessments complained of in the complainant's bill, by distraint or otherwise, and from serving notice as such treasurer forbidding the officers of said bank from making transfers of the shares or payment of dividends or other funds belonging to said shareholders. It is further ordered that said complainant pay to said defendant as treasurer the amount of taxes admitted by said bill to be due, if said treasurer will receive the same, and in case said treasurer receives the same his receipt therefor shall be without prejudice to his right to test the invalidity of the taxes in dispute in said case. It is further ordered that said complainant file herein its bond in the sum of $2,000, with surety approved by the clerk of said court, conditioned according to law, to indemnify defendant for any damage that may be awarded by the court in the premises against said complainant.

And afterwards, to wit, on Thursday, the 30th day of December, being a day of the October term, A. D. 1885, of said court, the following order was entered in this cause in this court, viz:

*Order.*

It being shown to the court that the first name of said defendant is Horatio and not Henry, on motion of said plaintiff it is ordered that the name Henry wherever it appears in the pleadings, process or return thereof or orders in said case, be changed to Horatio, and that hereafter said case proceed against said respondent as Horatio N. Whitbeck, instead of Henry N. Whitbeck.

And afterwards, to wit, on the 15th day of March, being a day of the February term, A. D. 1886, of said court, the following order was entered in this cause in said court, viz:

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,
*vs.*
HORATIO N. WHITBECK, Treasurer of Cuyahoga County, Ohio.

In this cause leave is given the respondent to file a demurrer to complainant's bill instanter.

64 And afterwards, to wit, on the 15th day of March, A. D. 1886, the following demurrer was filed in this cause in said court, viz:

*Demurrer.*

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Ohio, Complainant,
*vs.*
HORATIO N. WHITBECK, Treasurer of Cuyahoga County, Ohio, Defendant.
} Demurrer.

The demurrer of Horatio N. Whitbeck, treasurer of Cuyahoga county, defendant, to the bill of complaint of The Mercantile National Bank of Cleveland, Ohio, complainant.

To the judges of the circuit court of the United States for the northern district of Ohio, eastern division:

This defendant, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true, demurs thereto, and for cause of demurrer says:

1. That this court ought not to take cognizance of or sustain the action aforesaid, because he says that said court has no jurisdiction thereof, as it appears from said bill of complaint that said complainant is established and doing business in the city of Cleveland, in the county of Cuyahoga and State of Ohio.

2. And for further cause of demurrer he says that it appears by the complainant's own showing in its said bill of complaint that the said complainant is not entitled to the relief prayed for in its said

bill against this defendant, and that the facts set forth in the said bill of complaint do not make such a case as entitle said complainant to any relief whatever against the defendant. Wherefore, for divers other causes or demurrer appearing in the said bill of complaint, this defendant demurs to the said bill and to all matters and things therein contained, and prays the judgment of the court whether he shall be compelled to make any further or other answer to the said bill, and he prays to be hence dismissed with his reasonable costs in this behalf sustained.

We certify that in our opinion the foregoing demurrer of Horatio N. Whitbeck, treasurer of Cuyahoga county, Ohio, defendant,
65 to the bill of complaint of The Mercantile National Bank of Cleveland, Ohio, complainant, is well founded in law and proper to be filed in the above case.

HADDEN, DISSETTE, COLLISTER,
JAMES LAWRENCE,
CLARENCE BROWN,
*Solicitors for Respondent.*

UNITED STATES OF AMERICA,
*Northern District of Ohio, Eastern Division,* } ss:

Horation N. Whitbeck, being duly sworn, deposes and says that he has read the foregoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

H. N. WHITBECK.

Sworn to before me by said Horatio N. Whitbeck, and by him signed in my presence, this 15th day of March, 1886.

A. E. SHEARER, [SEAL.]
*Deputy Clerk, Common Pleas Court,*
*Cuyahoga County, Ohio.*

And afterwards, to wit, on Thursday, the 25th day of March, being a day of the February term, A. D. 1886, of said court, the following proceedings were had in this cause in said court, viz:

*Demurrer Overruled.*

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,
*vs.*
HORATIO N. WHITBECK, Treasurer of Cuyahoga County, Ohio.

This cause came on this day to be heard upon the demurrer of Horatio N. Whitbeck, treasurer, to the complainant's bill of complaint herein, and the same was *agreed* by counsel, and thereupon, upon consideration thereof, it is ordered that the same be overruled, and leave is given the respondent to file his answer by April 15th, 1886.

66 And afterwards, to wit, on the 22nd day of April, A. D. 1886, the following answer was filed in this cause in said court, viz:

*Answer.*

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, Complainant,
*vs.*
HORATIO N. WHITBECK, Treasurer of Cuyahoga County, Ohio, Defendant.
} Answer.

The answer of Horatio N. Whitbeck, treasurer of Cuyahoga county, Ohio, defendant, to the bill of complaint of The Mercantile National Bank of Cleveland, Ohio, complainant.

To the judges of the circuit court of the United States for the northern district of Ohio, eastern division:

This defendant reserving to himself all rights of exception to the said bill of complaint, for answer thereunto, admits that he is the treasurer of Cuyahoga county, Ohio, and is a citizen of Ohio, and of said national banking association, incorporated under the act of Congress mentioned in said complaint, with the amendments thereto, and is established and doing business in the city of Cleveland, in said northern district of Ohio; that said complainant has a capital stock of $1,000,000.00, divided into 10,000 shares of one hundred dollars each, all of which is paid up and certificates for the shares are outstanding. That the cashier of said complainant reported in duplicate to the auditor of said county the resources and liabilities of said banking association at the close of business on the Wednesday next preceding the second Monday in May, 1885, together with a statement of the names and residences of the stockholders therein, and the number of shares held by each, and the par value of each share, as required by section 2765 of the Revised Statutes of Ohio. That the real estate included in said return is otherwise and separately assessed and charged on the tax duplicate of said county. That the auditor of said county thereupon proceeded to fix the total value of the shares of said bank at $444,820.00, exclusive of the assessed value of its real estate, and made out and transmitted to the annual State board for the equalization of the shares of incorporated banks
67 a copy of the report as made by said cashier, together with the valuation of such shares as so fixed by said county auditor; that the said State board of equalization did examine the return aforesaid made by said cashier to said county auditor, and the value of such shares as fixed by said county auditor and the said board (having proceeded in all respects according to law) fixed the aggregate valuation of the shares of said complainant at $495,774.76, exclusive of the assessed value of its real estate; that the auditor of said State

did thereupon certify to the auditor of said county the valuation of the shares of said complainant as equalized and determined by said State board of equalization, which valuation the said county auditor did enter upon the tax duplicate of said county for the year 1885, and did also enter upon the tax duplicate for the year 1885 a tax on such valuation of such shares for said year amounting in the aggregate to $12,890.15, and upon a valuation as aforesaid of such shares of $495,774.76, exclusive of the assessed value of its real estate. And that afterwards the said duplicate, as required by law, with the said taxes charged thereon, was, by said county auditor, delivered to the said Horatio N. Whitbeck, treasurer of said county, to be by him collected. This defendant also admits that as said tax duplicate for the year 1885 was originally made up by said county auditor and delivered to the said county treasurer, the said tax levied on the total valuation of the shares of said bank, exclusive of the valuation of said real estate, was entered against the name of said complainant, without specifying therein the names of the several shareholders or the tax assessed on the shares held by each, but giving the separate valuation of each of said shares, exclusive of real estate, as fixed by said State board of equalization. He says that said tax was so entered against the name of said complainant because for many years the said complainant, in common with the other banks located in said county, had uniformly paid the taxes chargeable against the shares of its stockholders, and it was agreed and understood between said bank and said county auditor that it would continue to pay the same. This defendant does not admit that said duplicate, as so made up and delivered, was in any respect insufficient or illegal, but, in order to avoid all possible ground for complaint, the said county auditor, since the commencement of this bank action, has corrected the said duplicate, as he is authorized to do by the laws of Ohio, by duly entering thereon the names of the several shareholders
68 of said complainant, the number and valuation of the shares held by each, and the amount of tax chargeable thereon; and this defendant disclaims any purpose of enforcing the collection of said taxes in any other manner than as authorized by law. And further answering the said bill of complaint, this defendant denies that he or any others whose acts he is carrying into effect, is violating or has violated any rights of the shareholders of said complainant, either in respect to the taxation of their shares of stock in said bank, or otherwise; he denies that the said auditor of Cuyahoga county did meet with or consult with the board of equalization for the city of Cleveland, for the purpose of more accurately determining and fixing the value of said shares, or that the valuation by said county auditor reported to the State board of equalization, was fixed and determined upon by said county auditor with the assistance and approval of said city board of equalization, or that it is by law the duty of said city board of equalization to value and equalize for taxation all moneyed capital and personal property of every kind in the hands of individual citizens of the State of Ohio, resident in said city, except only the capital, assets and shares of incorporated banks. He denies that said county auditor placed the value upon said shares

which was in fact, or was known by him to be in excess of the value fixed in said county on other moneyed capital in the hands of individual citizens of the State of Ohio, and of said city and county. He denies that said State board of equalization did not examine any other returns made by said county auditor to said State auditor, except the return made by the cashier of said complainant to said county auditor, and the value of such shares as fixed by said county auditor, or that said State board of equalization knowingly or designedly did fix a higher per cent. of value and assessment for taxation upon the capital stock and shares of said complainant than upon the capital and shares of other banks organized and existing under the laws of the State of Ohio, or a higher rate per cent. than was assessed upon other moneyed capital in the hands of citizens of the State of Ohio, or higher than that fixed upon other moneyed capital in the hands of such citizens in the said county of Cuyahoga, city of Cleveland. He denies that said State board of equalization did not equalize the value of said shares with the value of other moneyed capital in the hands of citizens of the State of Ohio, county and city aforesaid, or that said State board of equalization designedly or intentionally placed a higher valuation thereon, or that the tax levied and assessed in the
69 valuation of said shares was or is in violation of law, unauthorized or void. Said defendant further denies that the levying and assessing of said tax against said complainant directly is in violation of the act of Congress of the United States under which said complainant is incorporated; he denies that the tax, the collection of which said complainant by its said bill seeks to enjoin is in violation of any act of Congress of the United States, or is levied or assessed in a manner which is in violation of any act of Congress of the United States. He denies that the shares of the capital stock of said complainant, the property of its shareholders, are not taxed by any law prescribing any uniform rule for the valuation of the property of said shareholders and the levying of taxes thereon, as provided by the constitution of the State of Ohio; he denies that the acts of the General Assembly of the State of Ohio, under and by virtue of which the taxes in said State are or purport to be assessed, do not have a uniform operation throughout said State as required by the constitution of the said State. He denies that the property of the owners and holders of the shares of the capital stock of said complainant, the property of its shareholders, are not taxed by any law prescribing any uniform rule for the valuation of the property of said shareholders and the levying of taxes thereon, as provided by the constitution of the State of Ohio; he denies that the acts of the General Assembly of the State of Ohio, under and by virtue of which the taxes in said State are or purport to be assessed, do not have a uniform operation throughout said State as required by the constitution of the said State. He denies that the property of the owners and holders of the shares of the capital stock of said complainant in said complainant corporation is not valued and taxed the same as the property of individuals, or that the burden of taxation upon the shares of said stockholders in

said corporations is very much or any greater than upon the property of individuals; he denies that equality has not been preserved in the valuation of said shares for taxation as compared with other property in the locality where said complainant is established; he denies that the valuation of said shares in proportion to the value thereof is fully twice as much as, or any more than, the valuation fixed upon other property. While admitting that the constitution and laws of Ohio contain provisions in reference to taxation substantially as quoted in said bill of complaint, this defendant says that all the provisions of said constitution and laws upon that
70 subject should be considered in order to determine the force and effect of those quoted, and he denies that a large amount of moneyed capital in the hands of individuals invested in promissory notes and other obligations and credits is expressly exempted from taxation in said State. He denies that any of the shareholders of said banking association, at the times named in said bill of complaint, were indebted or owing to others of *bona fide* debts, a sum in excess of the credits from which, under the laws of Ohio, he was entitled to deduct said debts, to an amount equal to the value of his said shares or any part thereof. He denies that either of said shareholders was then indebted in any sum whatever, or that, even if any of them was so indebted as claimed in said bill of complaint, he is hereby entitled to deduct the excess of such indebtedness over his credits from the assessed value of his said shares, or that for any reason said shares of stock should not have been placed on the tax duplicate and no tax assessed thereon. This defendant denies the averment in said petition that neither of said shareholders authorized any one to list his said shares for him. He denies that it was necessary for said shareholders so to do; he denies that at the time of the return and statement by the cashier of said banking association to the auditor of Cuyahoga county, neither said bank nor its cashier had knowledge of the indebtedness of said shareholders, if any such indebtedness existed; he denies that on the 17th day of December, 1885, or at any time, said complainant or any of said shareholders made due and legal showing and proof to the auditor of said county or to this defendant of the existence of said alleged indebtedness, or demanded that the same should be deducted from the assessed value of the shares owned by such shareholders and returned by said complainant. He denies that any sum whatever should be deducted from the valuation of the shares of the capital stock owned by said shareholders named in said bill of complaint. This defendant further denies that the taxes so levied and assessed on the shares of said complainant's stock are, for the reasons alleged in said bill of complaint, or for any reason, unjust, illegal or void. He denies that the laws of Ohio authorize and permit the owner of credits to deduct therefrom all debts owing by him or that such is the uniform practice throughout the State. He denies that the proceedings of said State board of equalization were in any respect irregular or illegal, or were for any reason of no binding obligation, or that said State board of equalization proceeded arbitrarily to increase the valuations for taxation upon said

complainant, and upon other national banks of the said
71 city, and upon the shareholders thereof without any opportunity for hearing. He denies that the taxation of the shares of said complainant's stock is at a much or any greater rate than is assessed upon other moneyed capital in the hands of individual citizens of said State of Ohio. He denies that the necessary effect of the proceedings had in the assessment and levy of the taxes standing against said complainant, and the shares thereof owned by its said shareholders, has been to deprive said complainant or said shareholders either in the matter of valuation or equalization of any of the benefits of the constitution or general laws of said State of Ohio, or to take from complainant or said shareholders any security afforded them by the limitations of said act of Congress, or to impose upon said complainant or said shareholders any undue or excessive exactions or any such exactions as to make the franchises granted by said act of Congress comparatively valueless. He denies that irreparable injury would be done either to complainant or to said shareholders, or any of them, by the enforcement of the lien created on said shares by section 2829 of the Revised Statutes of Ohio, or, that said complainant would thereby be subjected to great loss of standing or credit, or subjected to any other injuries for the redress of which the law affords no remedies, or that the franchise of said complainant granted by said act of Congress would be greatly impaired or rendered nearly useless, or that the disability imposed upon complainant to make transfers or pay dividends of, or upon said shares, upon which said taxes remains unpaid, would damage all the ordinary business of complainant, or introduce confusion or uncertainty into its transactions, or incur any loss of public confidence; or that if said complainant should pay the taxes for those of its shareholders whom by law it may pay for and deduct the amount from their dividends or other funds of said shareholders in its hands, it would be subjected legally to any suit which might be brought against it by said shareholders, or any of them, for so doing; or that said complainant would be subjected to great expense or irreparable injury by so doing, or that a great number of suits would be rendered necessary to adjust the rights of all the parties. And this defendant further denies each and every allegation in said bill of complaint not hereinbefore admitted or expressly denied. To the contrary of all of which this defendant avers that by and under the act of Congress of the United States, in said bill mentioned, the shares of stock
of said complainant are personal property, and in and by said
72 act it is permitted that the legislature of each State might determine and direct the manner and place of taxing all the shares of the national banking associations organized and established thereunder, located within such State, subject only to two restrictions, viz:

1st. That the taxation thereon should not be at a greater rate than should be assessed upon other moneyed capital in the hands of individual citizens of such State, and,

2nd. That the shares owned by any non-resident of the State should be taxed in the city or town in which such association should

be located and established. And this defendant says that the taxes mentioned in said complainant's bill, assessed upon the shares of said complainant is not taxed at a greater rate than is imposed by the State of Ohio and the laws thereof, upon other moneyed capital in the hands of the individual citizens of said State, and individual citizens of said county, city, and of said State, and that the shares of the non-resident shareholders are taxed in said city of Cleveland where said complainant's bank is established. And this defendant further says that said annual State board for the equalization of the shares of incorporated banks, consisting of the governor, auditor of State and attorney general of said State, did meet on the third Tuesday of June, A. D. 1885, at the office of said auditor of State at Columbus, and having before them the statement and returns of the complainant's cashier and the valuation of the complainant's shares fixed by said county auditor, with like returns and valuations of all the incorporated banks within the State of Ohio, proceeded to consider the same, and, having heard all complaints, equalized the value of the shares of all the incorporated banks within said State as determined upon and reported by the county auditor to said board and to said auditor of State, and thereupon made an equalization of the valuation of all the shares of all the incorporated banks within the State of Ohio according to the rules prescribed by the laws of said State for valuing and equalizing values of real and personal property; that in acting upon the shares of said complainant for the purpose of equalizing their value for taxation aforesaid, said annual State board of equalization was governed by the same rules and adopted and used the same methods as those by which it was governed and which is used in equalizing the shares of all other incorporated banks for taxation, and the same as governed and were used by all other equalizing boards and all other officers of said State, county and
73 city in the valuing and equalizing of all other property for taxation. That neither the said complainant or its cashier or other officers, nor any of its shareholders appeared before said board or presented to it any complaints or any statements of the several alleged matters and things now set forth in said bill of complaint. That it appearing from said cashier's return that the capital stock of complainant, taken together with its surplus and undivided profits, amounted to $1,042,730.41, and that said county auditor acting upon said return had fixed the value of all the shares of the said complainant for taxation at $444,820 (after having deducted from said value, the value of said real estate), said annual State board of equalization governed by the rules and adopting and using the methods aforesaid, and acting wholly within the limits and discretion allowed them by the statute of said State, increased said valuation so as aforesaid, fixed by said county auditor, by adding thereto $50,954.76, making said valuation of all of said shares $495,774.76, and each of said shares thereof (the par value of which is $100), $49.57, which sum is not in excess of the true value in money of said shares, but on the contrary, is much less than the true value in money thereof. And said board having equalized and fixed the valuation of said shares of complain-t, said auditor of

State thereupon transmitted to the auditor of Cuyahoga county the valuation of the shares of said complainant, as aforesaid, determined and fixed by said State board. And the said county auditor of said Cuyahoga county, thereupon, as he was required by law, did place upon the duplicate of said county, with all the other taxable property in said county, the said shares of said complainant at the valuation so fixed upon and determined by said State board of equalization, and assessed upon the same merely the same rate as was assessed upon all other property upon the county duplicate in the city of Cleveland for the said year of 1885, at the place where said complainant is located and doing business, and being the same rate as that assessed upon the moneyed capital of the individual citizens of said State, resident in said city of Cleveland. And this is the same tax mentioned and described in the complainant's bill. And this defendant further says that, under the laws of Ohio, he, as the treasurer of said county, has no duty or authority in respect to the assessment or appraisement of property for taxation; that the auditor of said county has no further duty or authority in respect to the assessment or appraisement for taxation of the shares
74 of incorporated banks after he has fixed the total value of such shares and has made out and transmitted to the annual State board for the equalization of the shares of incorporated banks a copy of the report made by the cashier of the several banks, together with the valuation of such shares as fixed by said auditor in pursuance of section 2766 of the Revised Statutes of Ohio; that if the shareholders of said complainant were entitled to any deduction from the value of their said shares on account of their individual indebtedness (which this defendant does not admit), due showing and demand therefor should have been made to said auditor of said county before he fixed the value of said shares, and transmitted the same to the auditor of State as aforesaid; but that no such showing or demand was made to said county auditor, nor was any showing or demand, or any complaint in respect thereto made to said State board of equalization. Defendant says that at the time when said complainant claims that its said shareholders made demand for the deduction of their alleged indebtedness from the valuation of their said shares, the entire process of the appraisement and equalization of the valuation of such shares had long since been completed, and neither this defendant nor said county auditor had then authority to allow any deduction whatever from the valuation of said shares as the same had been fixed and determined. And the said defendant further answering denies that the said complainant is entitled to the relief, or any part thereof in the said complaint demanded, and he prays to be hence dismissed with his reasonable costs and charges in this behalf sustained.

HADDEN, DISSETE & COLLISTER,
JAMES LAWRENCE,
CLARENCE BROWN,
*Solicitors for Defendant.*

UNITED STATES OF AMERICA, } ss:
*Northern District of Ohio,* }

H. N. Whitbeck, being duly sworn, deposes and says that he is the defendant in the foregoing answer; that he has read the same and knows the contents thereof and that the same is true, of his own knowledge, except as to the matters and things therein contained on information and belief, and as to such matters he verily believes them to be true.

H. N. WHITBECK.

75 Sworn to before me by the said H. N. Whitbeck, and by him subscribed in my presence this 21st day of April, A. D. 1886.

[SEAL.] L. E. MEACHAM,
*Deputy Clerk Common Pleas Court, Cuyahoga County, Ohio.*

And afterwards, to wit, on the 3rd day of May, A. D. 1886, the following replication was filed in this cause in said court, viz.:

*Replication.*

Circuit Court of the United States, Northern District of Ohio.

THE MERCANTILE NATIONAL BANK OF Cleveland, Ohio,
*vs.*
HORATIO N. WHITBECK, Treasurer, etc. } No. 4411. In Equity.

The replication of the above-named complainant to the answer of the above-named defendant.

The repliant saving and reserving to itself now and at all times hereafter all and all manner of benefits and advantage of exception which may be had or taken to the manifold insufficiences of said answer for replication thereunto says, that it will aver, maintain and prove the bill of complaint to be true, certain and sufficient in law to be answered unto; and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this that any other matter or thing whatever in the said answer contained, material and effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied is true; all which matters and things this repliant will be ready to aver, maintain and prove, as this honorable court shall direct, and humbly prays as in and by the said bill it has already prayed.

BOYNTON & HALE,
*Solicitors for Complainant.*

76 And afterwards, to wit, on Saturday, the 6th day of November, a day of the October term, A. D. 1886, of said court, the following order was entered in this cause in said court, viz:

*Order Appointing Special Master.*

In this cause it is ordered that A. J. Ricks, because he is experienced in matters of accounting, be appointed a special master to examine the evidence and record now on file and to report who, if any, of the shareholders of the complainant, on the day preceding the second Monday of October, 1885, had *bona fide* indebtedness which should have been deducted from the valuation of the shares.

And afterwards, to wit, on the 15th day of November, A. D. 1886, the following affidavit was filed in this cause in said court, viz:

*Affidavit of T. P. Handy.*

STATE OF OHIO, }
*Cuyahoga County,* } *ss:*

Affidavit.

T. P. Handy, being first duly sworn, on his oath says that the Mercantile national bank is a corporation organized and doing business at Cleveland, Ohio, under the act of Congress known as "national bank act," and the act amendatory thereto, and its shareholders are subject to the provisions of and entitled to the benefits conferred by section 5219 of the Revised Statutes of the United States; that on the day next preceding the second Monday of April, A. D. 1885, and at the time the cashier of said bank made out and returned to the auditor of Cuyahoga county, Ohio, a statement of the names and residences of the stockholders of said bank with the number of shares of the capital stock owned and held by each and the par value thereof for the year 1885, to wit, between the first and second Mondays in May, A. D. 1885, as required by section 2765 of the Revised Statutes of Ohio, affiant was an owner of 600 of said shares of the par value of $100 per share, and the same were returned, as belonging to him, by said cashier and from said day next preceding the second Monday of April, 1885, he has continued to own and now owns said number of shares of stock in said bank. Affiant further says that he has never been required by any authority to list said shares for taxation; that when the same were required to be and were so returned for taxation by said
77 cashier, and also on the day next preceding the second Monday of April, 1885, affiant was indebted and owing to others in legal *bona fide* debts the sum of $80,000 over and above any and all credits which by law he was entitled to deduct therefrom, and from which excess of debts over credits should be deducted said 600 shares of said stock. Affiant says that in making up the sum of said debts owing by him in excess of the credits deducted therefrom, he has not included any claim or obligation which section 2730 of the Revised Statutes of Ohio requires to be rejected, which he is ready to make, if required or permitted by an exhibit of such indebtedness. Affiant further says that the tax and assessment

upon said shares were made thereon in excess of the amount for which the same were assessable, without his authority or consent, and the same were listed by said cashier in the manner aforesaid without any authority from the affiant for so doing and in sole compliance with the statute, and affiant has had no opportunity or way provided to secure said deduction of credits from said shares other than to seek said deduction from the value of the shares since they were carried on the duplicate.

T. P. HANDY.

Sworn to before me, and in my presence subscribed this 16th day of December, A. D. 1885.

NORTON T. HORR,
*Notary Public.*

And afterwards, to wit, on the 8th day of November, A. D. 1886, the following master's report was filed in this cause in said court, viz:

*Report of Special Master.*

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, *vs.* H. N. WHITBECK, Treasurer. } In Equity. No. —.

To the honorable the judges of the circuit court:

By an order entered in this case the undersigned was ap-
78 pointed a special master to ascertain and report from the testimony and record, who, if any, of the shareholders of the complainant on the day preceding the second Monday of April, 1885, had *bona fide* indebtedness which should have been deducted from the valuation of the shares of the capital stock of complainant bank. The master reports that having examined the evidence and heard the claim of counsel, he finds and reports that all the shareholders are entitled to the deductions as charged in the bill, except the following, who should be taxed for the amount stated, viz: E. R. Perkins, had credit- subject to taxation above his indebtedness on the day named to the sum of $4,374.40; C. L. Murfry had credits subject to taxation above his indebtedness on the day named to the sum of $724; Robert L. Chamberlain had credits subject to taxation above his indebtedness on the day named to the sum of $4,448; James Parmelee had credits subject to taxation above his indebtedness on the day named to the sum of $3,113.60; James Barnett had credits subject to taxation above his indebtedness on the day named to the sum of $17,792. All of which is respectfully submitted.

A. J. RICKS,
*Special Master.*

And afterwards, to wit, on the 8th day of November, being a day of the October term, A. D. 1886, of said court, the following decree was entered in this cause in this said court, viz:

*Decree.*

THE MERCANTILE NATIONAL BANK
*vs.*
HORATIO N. WHITBECK, Treasurer of Cuyahoga County. } Decree.

At this term the parties appeared by their solicitors and this cause came on for hearing upon the merits, and the court being fully advised in the premises from the testimony and exhibits and special master's report adduced in open court, we find all the allegations of the bill to be true, except those allegations which charge that James A. Barnett, Robert L. Chamberlain and James Parmelee were
79 the owners of shares of capital stock of said bank, from which they were entitled to deduct, respectively, an indebtedness of theirs, which allegations the court finds are untrue. And it appearing to the court that the amount admitted to the court in said bill to be due to said respondent, has, pursuant to a former order of this court, been paid by said complainant to said respondent, and by him received, it is therefore ordered, adjudged and decreed that said respondent and his successors in office be forever enjoined from proceedings or attempting to collect or from collecting any part of or portion of said tax or assessment remaining unpaid, except the taxes levied upon the valuation of the shares of capital stock of complainant as fixed by the county auditor owned by said Barnett, Chamberlain and Parmelee amounting to $659.29 the amount of tax hereby enjoined being $3,967.55, and it is therefore ordered, adjudged and decreed that said respondent or his successors in office pay the costs in this suit to be taxed for which it is ordered that execution may issue as upon judgments at law.

And afterwards, to wit, on the — day of ——, A. D. 1886, the following proceedings were had in this cause in said court, viz:

*Decree Vacated.*

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, at the October Term, 1886.

THE MERCANTILE NATIONAL BANK OF CLEVELAND
*vs.*
HORATIO N. WHITBECK, Treasurer of Cuyahoga County, Ohio. } No. 4411.

The above-entitled cause having been submitted to the court, and the decree having been entered in said cause in favor of the complainant therein, and the defendant desiring to present the question arising in said cause to the Supreme Court of the United States to be finally decided, and for that purpose intending to appeal said

cause No. 4411; on motion of said defendant it is now ordered by the court that the decree- heretofore entered in the above-entitled causes numbered 4411, 4412, 4413, 4414, 4415, 4416, 4417
80 and 4418, be, and the same hereby are, set aside and vacated to await further orders of the court, and that the said several complainants have leave to apply any time hereafter to have said decree re-entered.

Approved:

HOWELL E. JACKSON,
*Circuit Judge.*

And afterwards, to wit, on the 8th day of April, 1887, the decree was rendered in the above-entitled case, which decree reads and is in the words and figures following, to wit:

April Term, A. D. 1887, to wit, Friday, April 8th, A. D. 1887.

Present: The Honorable Howell E. Jackson, United States circuit judge, and the Honorable Martin Welker, United States district judge.

THE MERCANTILE NATIONAL BANK, Cleveland, Ohio,
*vs.*
HORATIO N. WHITBECK, Treasurer of Cuyahoga County, Ohio.
} No. 4411. Chancery.

At this term the parties appeared by their solicitors, and this cause came on for hearing upon the merits, and the court being fully advised in the premises from the testimony and exhibits and special master's report, adduced in open court, do find *that* all the allegations of the bill to be true, except those allegations which charge that James A. Barnett, Robert L. Chamberlain and James Parmelee were the owners of shares of capital stock of said bank from which they were entitled to deduct, respectively, any indebtedness of theirs, which allegations the court find are untrue. And it appearing to the court that the amount admitted in said bill to be due the said respondent, has, pursuant to a former order of this court been paid by said complainant to said respondent and by him received. It is therefore ordered, adjudged and decreed that said respondent and his successors in office be forever enjoined from proceeding or attempting to collect or from collecting any part or portion of said tax or assessment remaining unpaid except the tax levied upon the valuation of the shares of the capital stock
81 of complainant as fixed by the county auditor owned by said Barnett, Chamberlain and Parmelee, amounting to $659.20, the amount of tax hereby enjoined being $3,967.55, and it is therefore ordered, adjudged and decreed that said respondent or his successors in office pay costs in this suit to be taxed at $183.47 for which it is ordered that execution may issue as upon judgments at law.

*Conclusions of Law.*

First. The master finds the issues made by the bill and answer, relating to the former adjudications of the question of the right to deduction of legal *bona fide* indebtedness of the stockholders from the value of their shares in determining their value for taxation, with the defendant; that such fact or right was not directly involved in the actions set up in the bill and it was not therein by said courts adjudicated and decided, and the fact carried into judgment in favor of said bank, that its stockholders were entitled to said deductions of indebtedness from the value of their shares, under the same legislation now existing on the subject, both State and national, and that said judgments are not in full force and effect, as against said defendant. The rule as to such matters adopted by the courts generally is that, "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

Second. The master further finds upon the issue made by the bill and the answer thereto, relating to the question of the right of the shareholders of the stock of said complainant bank, to a deduction of their legal, *bona fide* indebtedness from the value of their shares, in determining their valuation for taxation for the said respondent, and finds that upon the evidence adduced, and the law governing the same, that none of said shareholders, nor said complainant bank is entitled to the deduction asked for in the bill of complaint nor to any part thereof. The decision of the United States Supreme Court in the case of The First National Bank of Wellington, Ohio,
82 against H. P. Chapman, 173 U. S., p. 205, is conclusive on this question.

Third. Upon the issue raised by the second defense set out in the amendment to defendant's answer, the master finds in favor of said complainant and against said defendants; and finds the plea contained in the amendment does not constitute a defense to the matters contained in the bill.

The governor, auditor of State and attorney general constitute the State board for equalization of the shares of incorporated banks.

When the amount of taxes to be remitted under the provisions of section 167 shall exceed $100, the so-called board for remission of taxes is to be composed of precisely the same persons. An appeal, therefore, from the decision of those officers concerning a valuation for the purposes of taxation to the same persons sitting as a board of remission has not the merit of appealing from Philip drunk to Philip sober. Such a proceeding would be an anomaly in jurisprudence and highly absurd. But the functions of the board as organized under section 167 are altogether different from those of

the board organized under section 2808. One is to pass judicially upon a question of fact relative to the value of property to be assessed; while the other is for the remission of taxes that have been illegally assessed and such penalties as have accrued or may accrue in consequence of the negligence or error (clerical or otherwise) of any officer required to do any duty relating to the assessment of property for taxation.

Section 167 was not intended to correct the errors of judgment of such officers where they have discretionary powers, but such other errors as grow out of the illegal acts of clerical errors of such officers.

The board of equalization ceased to exist for any purpose when it adjourned *sine die*, December 4, 1897. It could not resuscitate itself by reorganizing under a different name.

The board provided for under section 167 has the same powers only with respect to amounts above one hundred dollars that the auditor has with respect to amounts below that sum. The supreme court of Ohio has decided in case of Black *et al.*, *vs.* Hagerty *et al.* (vol. 42, Law Bulletin, No. 7, page 144): "That the power conferred upon the auditor of State to remit taxes does not authorize him to reduce a valuation of real estate made in pursuance of law by a local board of equalization merely because he believes the valua-
83 tion to be excessive." If the auditor is powerless to afford relief in such case, then the full board is powerless to afford the relief asked for in this case, and the complainant having exhausted all other remedies, was forced to resort to a court of competent jurisdiction to obtain redress. And there is no doubt that jurisdiction in such causes is conferred upon this court.

Fourth. The only remaining question is: Did the board of equalization of the shares of incorporated banks have jurisdiction to increase the valuation of the shares of the complainant as fixed by the auditor of Cuyahoga county? And upon this question the master finds for the complainant.

It is admitted by counsel that if the State board of equalization had met on the third Tuesday of June, 1897, at the office of the auditor of State, as provided by section 2808, R. S., and had adjourned from day to day, or to any day certain named in the record of their proceedings, then the complainant would have been chargeable with notice.

But the board, as shown by the finding of facts herein, after meeting and organizing on the third Tuesday in June, of said year, adjourned to meet at the call of the secretary. No day was named in the record for the future meeting of the board, and although they met on divers other days stated in the findings of fact, they "adjourned," without naming a day for a future meeting, and such adjournment was in operation and effect an adjournment *sine die*. Having adjourned on the day fixed by law for their meeting, without taking action upon the valuation of complainant's shares, the complainant is no more chargeable by law with notice of any subsequent meetings than if the law had failed to provide a day for their meeting. The fact that on that day the statement of the bank and the report of the auditor thereon had not been laid before the

board, makes no difference. It only suggests a reason why the bank did not attend on the 15th of June.

In argument counsel for the defendant maintained that the statements filed by the bank's cashier was in effect a "hearing," a presentation of the facts upon which complainant submitted its case; on this suggestion Judge Fields, in the Railroad-tax cases, 13 Federal Reports, at page 758, says:

"The presentation to the State board by the corporation of a statement of its property and of its value, which it is required to furnish, is not the equivalent to a notice of the assessment made and of an opportunity to be heard thereon. It is a preliminary
84 proceeding, and until the assessment the corporation cannot know whether it will have good cause of complaint. No hearing upon the statement presented is allowed, and when the assessment is made the matter is closed; no opportunity to correct any errors committed is provided. The presentation of the statement can no more supersede the necessity of allowing a subsequent hearing of the owners, that the filing of a complaint in court can dispense with the right of the suitor and his contestant to be there heard.

There being, then, no provision of law giving to the company notice of the action of the State board, and an opportunity to be heard respecting it, is the assessment valid? Would the taking of the company's property in the enforcement of the tax levied according to the assessment be depriving it of its property without due process of law? It seems to us there can be but one answer to these questions. There is something repugnant to all notions of justice in the doctrine that any body of men can be clothed with the power to finally determine the value of another's property, according to which it may be taxed, without affording to him an opportunity of being heard respecting the correctness of their action."

If the board reconvenes on some day which has not been named in the previous adjournment, actual notice of some kind must be given to tax-payers who are to be effected by the action of the board at such meeting. Without such notice no opportunity is given to the tax-payer to be heard, and section 2809 clearly provides that the tax-payer may have an opportunity to make complaint either of the action of the county auditor in fixing the valuation of his bank shares, or of any proposed increase by the State board of equalization, and if no such notice be given, "taxes" which may be exacted by the officers under color of law are mere arbitrary burdens upon the tax-payer. This is not "due process of law" within the meaning of any system of taxation which expressly authorizes and provides that the tax-payer may have a hearing upon the question of the valuation to be placed upon his property for taxation purposes. There is nothing in the suggestion that the complainant should have shown that it made an attempt to be heard. The law does not require that the citizen should perform an idle ceremony to protect a constitutional right. The complainant was satisfied with the valuation fixed by the county auditor. It had no notice of any kind that the State board contemplated any action that would increase that valuation. Why should he ask to be heard under such circum-

stances? Immediately after the action of the board in
85 increasing the valuation of the complainant's shares, the board adjourned *sine die*. The bank was as effectually debarred of a hearing as if the law had provided for none. It would be mockery to assert that the citizen had been protected because there had been a general opportunity for a hearing on the days the board were actually in session, but of which we had no legal notice. A doctrine which would require a citizen of Cleveland, who had no knowledge in fact of the proposed action by the board, to attend at the auditor's office at Columbus every week day from the 15th day of June to the 4th day of December and watch the proceedings of the board in order to protect his rights, with the danger of losing a hearing if he should for a moment slack his vigilance, would be grotesque in its absurdity, monstrous in its injustice and subversive alike of the spirit and the letter of the law.

It is no justification of the action of the board of equalization in raising assessments without notice that the conclusion reached by them was fair and accorded with substantial justice. (Lewis *vs.* Bishop, 53 Pac. 165.)

From grave considerations of public policy the law will presume an injury, if no notice is given.

The irregularity complained of in the State Railroad-tax cases, 92 U. S., at page 575, is not the same as in this case. In that case the board of equalization was dealing with aggregates, and was equalizing aggregate valuations by counties, just as the decennial board of equalization in Ohio deals with the assessed valuations by counties. Where the State board finds that the aggregate value of any county is below the average as compared with other counties, it may direct the county auditor to increase the aggregate by a certain percentage, and that percentage is added to the valuation of individual tracts or parcels, but there is no discrimination as between the individual tax-payers, and no notice is provided for. In such a case it would be unreasonable for each individual tax-payer to receive a notice, for "the expense of giving such notices the delay of hearing each individual would render the exercise of the main function of this board impossible."

But when the State board encroaches upon the domain of the county auditor in an attempt to adjust and equalize valuations of property within the county as between individuals, its proceedings should be governed by the same rules that the auditor or county boards are in such cases.

Section 2809, under which the State board assumed to act,
86 provides that, "said board shall hear complaints and equalize the value of said shares according to the rules prescribed by their title for valuing and equalizing the values of real and personal property."

The rules for valuing and equalizing values of real and personal property are stated in section 2804, R. S., which is as follows:

SECTION 2804. "The annual county board shall not increase or reduce the valuation of any real estate except in cases of gross irreg-

ularity, and then only upon reasonable notice to all persons directly interested and an opportunity for a full hearing of the question involved."

The conclusions of Justice Field, stated in the Railroad-tax cases, 13 Federal Reporter, at page 752, are exactly in point in this case. He says: "The necessities of revenue for the support of government will not admit of the delays attendant upon judicial proceedings in the courts of justice. The statute fixes the rate of taxation upon the value of the property, and appoints officers to estimate and appraise the value. Due process of law in the proceeding is deemed to be pursued, when, after the assessment is made by the assessing officers upon such information as they may obtain, the owner is allowed a reasonable opportunity, at a time and place to be designated, to be heard respecting the correctness of the assessment, and to show any errors in the valuation committed by the officers. Notice to him will be deemed sufficient, if the time and place of hearing be designated by statute. But whatever the character of the proceeding, whether judicial or administrative, summary or protracted, and whether it takes property directly, or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established by a weight of authority absolutely overwhelming than that notice and opportunity to be heard are indispensable to the validity of the proceeding."

The authorities cited by counsel in briefs filed herein constrain me to adopt the conclusions of Justice Field in his opinion in the Railroad-tax cases, above referred to.

The master, therefore, finds that the complainant bank has paid of the taxes assessed against its stock for the year 1897 the sum of $12,210.62, in compliance with the former order of this court, and that there is due from it the further sum of $3,524.78 on account of said taxes for said year, but that the remaining $3,726.90 of the tax for that year assessed against its stockholders, by reason of the
87 addition made by the State board is improperly and unlawfully assessed.

All of which is respectfully submitted.

IRVIN BELFORD,
*Special Master.*

October 31st, 1899.

The undersigned report- and files herewith the evidence, stipulations of counsel and proofs transcribed from the stenographic notes thereof taken before the examiner and by him duly certified, contained in four separately bound volumes, indorsed part first, part second, part third and part fourth, and the depositions of G. W. Taylor, W. D. Guilbert and Lewis D. Boynton, all of which proofs have been duly filed in said cause. All of which proofs and exhibits are attached hereto and made part of this report.

All of which is respectfully submitted.

IRVINE BELFORD,
*Special Master.*

Dated Oct. 31st, 1899.

Endorsements on report of Irvin Belford, special master.

No. 5714. U. S. circuit court, northern district of Ohio, eastern division. The Mercantile National Bank of Cleveland, O., *vs.* R. S. Hubbard, as treasurer of Cuyahoga Co. Report of Irvin Belford, special master. Filed Oct. 31, 1899. Irvin Belford, clerk, U. S. circuit court, N. D. O.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

| | | |
|---|---|---|
| THE MERCANTILE NATIONAL BANK OF Cleveland, Ohio, *vs.* R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio. | Chancery. | No. 5714. |

NORTHERN DISTRICT OF OHIO, *ss:*

I, Irvin Belford, clerk of the circuit court of the United States for said district, do hereby certify that the annexed and foregoing pages, embraced in volume number 1, contain a full and true copy of the final record up to and including the report of the special
88 master and proceedings had in said cause; and there is contained in volumes 2 and 3, a correct, full and true copy of the residue of the final record, including the petition for appeal, assignment of errors and all other proceedings in said cause, and there is annexed to and transmitted with such record a true copy of the opinion of the court, documentary evidence, depositions and testimony admitted in evidence in said cause (except such testimony as is excluded by stipulations of counsel recorded herein), the originals of all which copies are now in my custody as clerk of said court.

In testimony whereof, I have hereunto signed my name and affixed the seal of said court, at Cleveland, in said district, this 31st day of January, A. D. 1900, and in the 124th year of the Independence of the United States of America.

[SEAL.]

IRVIN BELFORD, *Clerk,*
By JNO. VAN NOSTRAN, *Deputy.*

*Stipulation as to Exclusion of Certain Testimony.*

In the United States Circuit Court, Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK, Plaintiff, *vs.* R. S. HUBBARD, Treasurer, Defendant. } Stipulation. No. 5714.

The parties to this cause stipulate hereby that the clerk in preparing the transcript of the record of this cause on appeal to the circuit court of appeals, shall omit therefrom the following portions which do not properly belong or appertain to said record.

All affidavits of stockholders except those filing claims as stockholders of Mercantile national bank.

All records of prior adjudications in which the Mercantile nat'l bank was not the party complainant.

Jan. 19, 1900.

W. W. BOYNTON AND
N. T. HORR,
*Plaintiff's Solicitors.*
P. H. KAISER,
*Of Counsel for Defendant.*

89 Endorsements on stipulation: Mercantile National Bank *vs.* R. S. Hubbard, treas. 5714. Stipulation. Filed Jan. 19, 1900. Irvine Belford, clerk U. S. circuit court, N. D. O.

*Stipulation as to Exclusion of Certain Testimony.*

In the United States Circuit Court, Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK, Plaintiff, *vs.* R. S. HUBBARD, Treasurer, Defendant. } Stipulation. No. 5714.

The parties to this cause hereby stipulate, that of the testimony offered by the parties hereto in the form of depositions, or otherwise and reported by the examiner and the master, in part fourth, there shall only be transcribed and included in the transcript the testimony of Peter R. Fahey, G. N. Calvert, S. C. Hale, Frank J. Smith Charles L. Murphey and W. D. Guilbert, together with the stipulation at page 325 of the fourth part of the printed testimony, and the deposition of G. W. Taylor, except the copies exhibited by him of the reports of national banks in Cleveland, other than that of the plaintiff. The remainder of the testimony in part fourth of said testimony is only pertinent to and was offered in evidence in the

cases brought by other plaintiffs, and it is only such evidence that is agreed to be excluded from the record herein.

Jan. 26, 1900.

THE MERCANTILE NATIONAL BANK,
By W. W. BOYNTON &
NORTON T. HORR, *Its Attorneys.*
R. S. HUBBARD,
By P. H. KAISER AND
F. L. TAFT, *His Att'ys.*
SMITH W. BENNETT, *One of His Attorneys.*

Endorsements on stipulation: 5714. Mercantile Nat'l Bank *vs.* R. S. Hubbard, treas. Stipulation. Filed Jan. 27, 1900. Irvin Belford, clerk, U. S. circuit court, N. D. O.

90 U. S. Circuit Court, N. D. Ohio, E. D.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Plaintiff,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Defendant.
} No. 5714.

The defendant has due notice that the plaintiff will proceed to take testimony on its behalf before Irvin Belford, examiner, at the office of the clerk of the United States circuit court in the Federal building at Cleveland, Ohio, at 10 o'clock a. m., Tuesday, August 16th, 1898, and will continue the same under adjournments from day to day or otherwise as may be agreed upon.

P. H. KAISER,
*Att'y for Defendant.*

Aug. 13, 1898.

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

MERCANTILE NATIONAL BANK OF CLEVELAND, Complainant,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Respondent.
} Depositions.

The examination of witnesses, beginning on the 16th day of August, A. D. 1898, at 10 o'clock a. m., on behalf of the complainant, before me, Irvin Belford, special examiner, at the office of the clerk of the United States circuit court in the city of Cleveland, Ohio, in said district, in the above-entitled cause now depending and undetermined in the circuit court of the United States for the northern district of Ohio, in pursuance of due notice to the defendant's solicitors.

Such testimony is to be taken orally and be taken down by S. Louise Patteson, a skillful stenographer, approved by both parties, and by her be put into typewriting.

91 *Appearances.*

Hon. W. W. Boynton, counsel.
Messrs. Horr & Uhl, by Mr. Horr.
Messrs. Webster & Cook, by Mr. Cook,
Messrs. Hoyt, Dustin & Kelley, by Mr. Dustin,
Solicitors for complainants.
Hon. F. S. Monnett, attorney general,
Mr. Smith W. Bennett, ass't att'y general,
Hon. P. H. Kaiser, solicitor for Cuyahoga county,
Solicitors for respondents.

In the United States Circuit Court, Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Ohio, Plaintiff,
*vs.*
R. S. HUBBARD, Treasurer of Cuyahoga County, Ohio, Defendant.
} Stipulation.

It is stipulated by the parties hereto that there are two hundred and fifty (250) private, unincorporated banks in the State and were in the year 1897.

The above fact is subject to all objections by the defendant for irrelevancy or incompetency.

F. S. MONNETT,
*Att'y for Def't.*
P. H. KAISER,
*Att'y for Def't.*
W. W. BOYNTON,
*Att'y for Pl'ff.*

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

MERCANTILE NATIONAL BANK OF CLEVELAND, Complainant,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Respondent.
} Stipulation.

92 It is stipulated that all testimony taken in this case by either party, may and shall be used in the following-entitled causes, with the same effect, so far as competent, as if originally taken for use therein:

National Bank of Commerce *vs.* R. S. Hubbard, as treasurer of Cuyahoga county, O.

Commercial National Bank *vs.* R. S. Hubbard, as treasurer of Cuyahoga county, O.

Central National Bank *vs.* R. S. Hubbard, as treasurer of Cuyahoga county, O.

National City Bank *vs.* R. S. Hubbard, as treasurer of Cuyahoga county, O.

Western Reserve National Bank *vs.* R. S. Hubbard, as treasurer of Cuyahoga county, O.

First National Bank *vs.* R. S. Hubbard, as treasurer of Cuyahoga county, O.

Cleveland National Bank *vs.* R. S. Hubbard, as treasurer of Cuyahoga county, O.

State National Bank *vs.* R. S. Hubbard, as treasurer of Cuyahoga county, O.

Union National Bank *vs.* R. S. Hubbard, as treasurer of Cuyahoga county, O.

Park National Bank *vs.* R. S. Hubbard, as treasurer of Cuyahoga county, O.

Euclid Avenue National Bank *vs.* R. S. Hubbard, as treasurer of Cuyahoga county, O.

W. W. BOYNTON,
HORR & UHL,
WEBSTER & COOK,
A. C. DUSTIN,
*For Plaintiffs.*
F. S. MONNETT, *Att'y Gen.*,
P. H. KAISER,
*For Defendant.*

THEODORE M. BATES, a witness produced on behalf of said complainant, being duly sworn, deposes and says as follows:

Direct examination.

By Judge BOYNTON:

Q. 1. State your name, age and place of residence.
A. T. M. Bates, age 40, residence Cleveland, 76 Mayfield St.
Q. 2. What is your business?
A. Attorney at the present time.
93 Q. 3. If at any time you were on the board of equalization of Cleveland, you may state the fact and when?
A. I was a member of the board of equalization and assessments of the city of Cleveland for four years, beginning with May, 1892.
Q. 4. Consecutive years?
A. Consecutive years.
Q. 5. Who were associated with you?
A. Mr. J. B. Molyneaux, Mr. B. F. Phinney, during all the time I was a member of the board.
Q. 6. How continuously was the board in session during those years?
A. All the time.
Q. 7. Engaged in what?
A. In the equalization of personal property and real estate in the city of Cleveland.
Q. 8. When did you cease connection with the board?

A. About May 1st, 1896.

Q. 9. What has been your connection with it since, by way of practice or otherwise?

A. I have had a large amount of practice representing different persons and corporations in the adjustment of their tax matters before the board, since I was a member.

Q. 10. During your membership of the board, and since if you know, at what percentage of the face or actual value of money were obligations such as bonds, notes, credits and the like listed at by the board of equalization for the city?

To which question Mr. Monnett, in behalf of defendant, objected.

A. It was the rule of the board, to list that class of securities in taxable valuation at 60 per cent. of what was considered their actual cash value, during the time I was a member of the board, and it has been so since that time as far as my practice before the board has shown.

To which answer defendant objected and moved the court to withdraw the same as incompetent and irrelevant.

Q. 11. Do you know of any change in the rule by the board since you left the board?

To which question defendant objected.

A. There has not been any change to my certain knowledge, up to the time that that board continued in existence.

Defendant objected to the answer and moved the court to withdraw the same as incompetent and irrelevant.

Q. 12. When did the board go out of existence?

94 A. This last month, in July.

Q. 13. In consequence of a ruling of the supreme court?

A. Yes, a judgment of ouster, I believe.

Q. 14. Prior to the year 1892, you may state what knowledge you had of the percentage at which such securities, including stocks, were listed in the county of Cuyahoga?

To which question defendant objected.

A. I understood it was on the same basis, 60 per cent. All the records of our predecessors practically bore that out.

To which answer defendant objected, and moved the court to withdraw same from the record.

Q. 15. Do you know at what rate or percentage of the actual value the auditor of Cuyahoga county listed property, which in fact was listed by him during those years?

A. Do you mean personal property?

Q. 16. I mean stocks, bonds, promissory notes, credits and the like.

Same objection by defendant.

A. I don't know positively.

Q. 17. Did your board, upon omissions of personal property of the kind above mentioned, call in people to supply their omissions?

A. Yes.

Q. 18. Was that a matter of frequent occurrence?

A. Yes.

Q. 19. At what percentage of actual value was the listing made of such property?

To which question defendant objected on the ground that said board's records are the best evidence, and on the further ground that said board was an illegal body, and that the time referred to does not cover the period for which plaintiffs complained of their valuation.

A. When we considered that it was an innocent omission and not done for the purpose of evading taxes, we fixed it at 60 per cent. Occasionally when we considered that there had been a direct attempt to evade the returning what should have been returned, we put on, under the law authorizing it, 50 per cent. penalty. We put on the penalty and made the valuation about 90 per cent.

Q. 20. That is, in such cases of fraudulent withholding of property, your valuation as I understand was 60 per cent., with a penalty of 50 per cent. added?

A. Yes. I don't know as our records positively show that. That was the basis on which we fixed it.

95 Q. 21. You may state what was your practice.

A. I think that was our rule, where we considered that there had been a recognized attempt to evade paying taxes.

Q. 22. Have you, since you left the board, had any practice before the auditor or the tax inquisitor, in which cases they listed property of clients of yours?

A. Yes.

Q. 23. At what percentage of the actual value were they listed where the auditor was satisfied that the omissions of return were innocent?

Same objection by defendant.

A. In no case have either the auditor or tax inquisitors, or the board fixed it to exceed 60 per cent. where they were satisfied it was an innocent omission, to my recollection.

Q. 24. So far as your knowledge goes, at what percentage of valuation have securities above mentioned been actually returned by the owners thereof to the assessors?

Same objection by defendant.

A. We have customarily followed the 60 per cent. rule. Of course, some have returned less than that, which was discovered on investigation. But most of them returning have been aware of this general rule, and returned on that basis.

Q. 25. During your membership of the board to what extent did your inquiries extend into the valuation of real estate in the county of Cuyahoga?

To which question defendant objected as irrelevant and incompetent.

A. Quite extensively.

Q. 26. And into tangible personal property?

Same objection by defendant.

A. We had quite a great deal to do with each of them.

Q. 27. At what percentage of actual value have additions to real estate been made or were they made during the years of your membership of the board?

Same objection by defendant.

A. On the basis of about 50 per cent. of the asking price of the actual cash value, which we considered in the neighborhood of about the basis of 60 per cent. of the real cash value. For a time we figured 45 per cent. of the asking price, but during my connection with the board we were satisfied we made that a little low, and we changed to 50 per cent. of the asking price.

To which answer defendant objected as not being the best evidence.

96 Q. 28. At what percentage of its actual valuation was tangible personal property assessed?

Same objection by defendant.

A. Our board had a rule on stocks and merchandise and manufacturer's stocks, of taking about 40 per cent. of the invoice price. That was done on the basis of considering it about equal to 60 per cent. of the cash value in case the entire stock had to be turned into money.

Q. 29. What knowledge had you of the amount of credits in the county which were never in fact returned for taxation?

A. I am under the impression that there is a very large quantity of them from the experience I had in connection with that board and on it, for various causes.

To which answer defendant objected.

Q. 30. Give some of those causes.

A. From the fact that a great many credits are held by women and members of the family other than the head of the family; from the fact that our board is supposed to have jurisdiction only in the city, while a great many holders of credits live outside of the city. Bank deposits, for instance, were held by minors and by persons who otherwise perhaps would not be subject to taxation. So that, considering the total amount of credits as a whole in the way of bank deposits or mortgages, there was quite a small percentage actually listed.

Same objection by defendant.

Q. 31. Is it or is it not true that owners of credits who returned the same for taxation, disclose by their return the amount of debts

taken from their credits? Or, do they merely return the excess of credits over the debts?

Same objection by defendant.

A. The excess of credits is the more customary way, although the board with which I was connected endeavored to make people make their return show the actual amount of credits and debts and the difference; and that has been done to some extent. The former method is the more ordinary. If you take the great bulk of returns as they are made to the auditor, they would not disclose the actual amount of debts or property, but the simple percentage of the total number.

Cross-examination of THEODORE M. BATES.

By Mr. MONNETT:

Q. 32. You are referring to yourself as a member of the board of equalization known as the Cleveland board in the statutes under an act passed and reported in 89 O. L., page 283?

97 A. Yes.

Q. 33. You say you acted under powers that were vested in you by virtue of the act referred to, from May 1892, to May, 1896?

A. Yes.

Q. 34. And then after that period you appeared before this board as attorney for various corporations and individuals for the purpose of having their tax values reduced, as returned by the assessors and the county auditor?

A. Not necessarily. Very often the board would issue notice to persons and corporations to appear before them to explain in regard to their tax returns, and I went with them as attorney attending to their interests, whatever that was, which would result perhaps in their terms being accepted by the board, and perhaps in an increase. I also did appear for the purpose of getting—not customarily—their personal property reduced, and occasionally personally property in the way of what had been considered illegal items that had been returned.

Q. 35. You still act in that capacity?

A. Yes.

Q. 36. Have you been attorney for any of these plaintiff banks in having their taxes reduced?

A. I think not. I have represented no banks at all.

Q. 37. Any of the stockholders that are represented in these banks?

A. I don't know who the parties to this proceeding are, except the Mercantile national bank. I don't know anything of the nature of this proceeding. If there is a large number of banks, perhaps I knew a little of the proceedings at the time they were begun. I think I did represent the Merchants' Banking and Storage Company in one matter. I am quite sure, perhaps I have given advice to a number of others, but I presume not on matters of this kind. The

Garfield Savings and Banking Company for instance, but I think no national banks.

Q. 38. In the capacity of attorney since you have been off the board, have you appeared to raise or lower valuations?

A. I customarily have attended to the interest of the persons who employed me. When I was a member of the board I was working for the city endeavoring to see that taxes were brought in all that could be, and worked faithfully to that end in conformity with the law.

Q. 39. And since then you have been employed by persons who wanted their tax valuations reduced?

A. Yes.

Q. 40. That is your present capacity?

98 A. Yes. Parties come to me and think that their taxes are too high. I act for them in that capacity, first investigating myself as to my own information. I have had a great many people come who thought they were taxed too high, and I investigated the matter and advised them that they better be satisfied. Others I have told they had good points in their favor, and got reductions.

Q. 41. You appeal for parties now to have their taxes reduced?

A. Yes, as their attorney. They come to me in that capacity.

Q. 42. By reason of your connection with this board for four years, it has given you an education specially in that line?

A. Somewhat.

Q. 43. And by reason of the information you gained while a member of this board, you are enabled to give advice on these matters that perhaps a man not having given it the same study, could not give?

A. Naturally I acquired some familiarity with it that would be of benefit to people in my capacity as their attorney.

Q. 44. While you were a member of this board you appointed assessors, did you not?

A. Yes.

Q. 45. Do you mean to say you gave the assessors instructions under oath to appraise property at 60 per cent. of its true value, such as you have narrated to the court?

A. I think we did as far as this class of property was concerned.

Q. 46. Would you say you gave the assessors authority and instructions, and requested them to return investments in bonds, stocks in joint stock and otherwise at 60 per cent. of their usual selling price in cash?

A. Our instructions were not in that shape. Where we were satisfied that parties had returned 60 per cent. of the actual value, we did not interfere, or insist upon larger returns. I think that was practically their instructions.

Q. 47. Will you tell the court where you got the authority to give such instructions?

A. We followed the case of the Mercantile national bank against Whitbeck, treasurer, where the Supreme Court laid down the law on the subject. I think Judge Boynton had the case some ten years ago or so, in which the supreme court held that the fixing of 60 per

cent. upon bank stock, if other money capital and real estate was actually listed on that basis.

99 Q 48. The Whitbeck case says if the taxing officers had put in the personal property of the State or city at 60 per cent., they could not exceed that for the purpose of taxing banks? But you hadn't anything to do with bank stocks. You are now talking about something you had no commission for. Do you claim you had to fix one single national bank in the city of Cleveland?

A. We had such banks as the Society for Savings.

Q. 49. How did the Whitbeck case give you any authority?

A. We considered that our sacred trust and duty, to equalize.

Q. 50. Your oath was to obey the laws of the State of Ohio?

A. We considered that the interpretation of this case by the Supreme Court was part of our duty.

Q. 51. Which case?

A. The Whitbeck case.

Q. 52. The Whitbeck case says if the taxing officers of the taxing district had put State property at a given per cent., then the court would protect the national banks in that per cent. Was you fixing up this case for them by fixing State and city valuation at 60 per cent.?

A. We discovered when we were first appointed on that board that our predecessors had been acting upon the 60 per cent. basis; that bank stocks in the city as far as our knowledge went was actually fixed at 60 per cent. We had half a dozen banks which it was our duty to fix, among them the Citizens' Savings and Loan Company, which, conforming to that rule, we brought up from $300,000 to a million dollars tax valuation in one year; and we considered that in the equalization of taxes to make other stocks and bonds and mortgages and investments on a par with national bank stock over which we had no control, that fixing it on a 60 per cent. basis was proper and in accordance with our oaths and duties.

Q. 53. The national banks go into the United States court in the Whitbeck case, and they fix the valuation of 60 per cent. because that's the valuation fixed by the local taxing authorities of State property?

A. I judge so.

Q. 54. Now you turn around and you reverse that proposition?

A. No, we merely continued it.

Q. 55. You say you have found that the Supreme Court of the United States said that they should not pay higher than 60 per cent., and you adopted that as a standard for State property?

100 A. We felt this way: That the stand of the Supreme Court in holding that that 60 per cent. valuation on bank stocks was legal and proper if the local authorities had fixed 60 per cent. on the other, practically confirmed the right of the local authorities to fix 60 per cent., and we were merely following the precedent laid down.

Q. 56. You discovered that your predecessors had fixed 60 per cent.?

A. Yes.

Q. 57. You didn't discover your oaths and your laws requiring you to return at 100 per cent.?

A. We considered that the proper interpretation of——

Q. 58. But inasmuch as the supreme court had inferentially justified lawlessness, you said you would follow it out?

A. We considered that the proper interpretation of the true intent and meaning of the law.

Q. 59. If the Ohio statute required you—section 2749—to list bonds, stocks and investments in joint stock companies for taxation at the value ascertained by the usual selling prices thereof for cash at voluntary sales at the time and place of listing; and that if your predecessors who had violated that rule and ignored selling prices and fixed it at 60 per cent. of the selling price and established an illegal custom, you thought you had a right to follow that because the Supreme Court of the United States said United States banks should not exceed what — had illegally thus fixed. Was that your argument?

A. I do not like to say "yes" to that because it is not all I agree to. I would say that, considering the law, even the strictness of the statute you are reading, and considering the well-known and universal custom throughout the State of Ohio in regard to it and this decision, we consider our duty was plain in the matter, living up to our oaths, and I haven't the slightest conscientious scruple, and do not think it interfered with the true intent and meaning of the law of the State of Ohio, taken as a whole.

Q. 60. You claim that, notwithstanding the language of the constitution, which provides that laws should be passed fixing all moneys, credits and investments in bonds and joint stock companies and otherwise, and also of the rule that personal property should be listed according to its true value of money, that the statute based upon that constitutional provision which I have just quoted can be evaded because it has been done so in the past. Is that the theory you went on?

A. We had no responsibility for the passage of laws whatever.

101 Q. 61. What do you mean by that?

A. Your constitution says that laws may be passed so and so.

Q. 62. Weren't they passed in section 2739 that I have read to you?

A. We went by the general statute—first by the law in volume 81 page 283, and then the law applying to general boards of equalization.

Q. 63. You were organized under that, and took your oath as the statute says?

A. Yes.

Q. 64. To enforce the constitutional provisions set forth in plaintiff's petition which I have just read to you?

A. It seems as if the constitution did not have much to do with

that board. We followed the statute. The supreme court said the whole thing was in conflict with the constitution. We tried to follow the statute to the best of our knowledge.

Q. 65. You mean the supreme court treated you as outlaws because you did not follow the constitution?

A. We didn't consider we were placed there for the purpose of bothering with constitutional questions.

Q. 66. You started out to explain to the court that you had a right because your predecessors had not followed sections 2739 and 2749, laying down the rule for listing property, that you could proceed to ignore those sections and fix the value at 60 per cent.

To which question Judge Boynton on behalf of plaintiff objected on the ground that it is wholly irrelevant as to what reasons witness may have had for listing property at 60 per cent. of its cash value, the question to be decided being whether or not 60 per cent. was in fact adopted as a basis?

A. No, sir, we considered that we were following those sections according to our interpretation of the true intent and meaning of them, in connection with our duties as an equalizing board of real and personal property.

Q. 67. Was it because of the Whitbeck case, or because of your construction of these statutes that you fixed them at 60 per cent.?

A. Both.

Q. 68. In what way did you interpret sections 2739 and 2749, that gives you that construction?

A. I think I have pretty fully stated that what we considered had come to be quite a universal custom throughout the State to the best of our knowledge, and we considered that custom had been strengthened by this Whitbeck case, and that our oaths were
102 not only to assess that property at its true value of money, but we were sworn to equalize values of personal property, and add to those that in our opinion were assessed lower according to the average valuation—if you notice the law—and to raise those that were assessed too low, taking into consideration the average, and lower those that were assessed too high. That was part of our oath, as well as the other.

Q. 69. You chose to ignore that part which lay stress on the value, and laid great stress on equalization. I wish you would explain to the court what you mean when you say that you found the actual cash value and then aimed to fix 60 per cent. of that, when you are required in sections 2739 and 2749 to bring all property up to its actual true value thereof in money?

A. I think that is just what I have been endeavoring to explain.

Q. 70. You have explained the reason you made them 60 per cent. was because some were below and some were above. How does it come you reduced them to 60, or permitted them to remain at 60 per cent.?

A. Because it was our sworn duty to equalize.

Q. 71. It was also your sworn duty to return them at the cash

value. Why was one part of the oath so binding and the other of no effect? Why did you equalize at all?

A. We had an idea that's what we were there for.

Q. 72. When did you lose the idea that you were there to put the true value of money on it?

A. I explained that.

Q. 73. Isn't it a fact that it is just as you said; you simply followed the old board's rulings or the old board's findings, and never attempted to raise them to the true value of money?

A. We never attempted to fix the valuation of bonds, stocks, or credits at their real face value, the actual selling value in money. We had adopted this policy of 60 per cent., and it resulted in the addition to the duplicate of from three million dollars to five millions dollars every year, and in addition to what our predecessors had had every year when I was a member of the board—three million dollars to five million dollars in three different years. The honest carrying out of the laws on equalization resulted in that. If we had attempted to make it 100 per cent., it would have been impossible, and it would have resulted in less being added to the duplicate than the theory on which we proceeded.

Q. 74. You told the court that under section 2783 if a man concealed, or refused to obey the law in reporting for taxation, you put a penalty of 50 per cent. on?

103 A. I don't know if I said we didn't have the power, I to conceal his property.

Q. 79. Do you know anything about the rules outside you could not enforce that?

A. The intention of the law was plainly, that in such cases there should be a penalty added for that violation.

Q. 76. You enforced that. If you had the power to enforce that, what makes you assume you hadn't any power to carry out the statute in the other respects?

A. I don't know if I said we didn't have the power, I don't know that I did—I stated I didn't think we could practically equalize personal property and place stocks and bonds at 100 per cent. on the dollar, when we knew we could not assess the stocks of merchants and manufacturers at anything like 100 cents on the dollar and actually get them paid and returned, and bring the duplicate up to the enormous amount that that would have brought it to. We believed that if we attempted it on one class of property and not on the other, we would work an injustice to the tax-payers of Cleveland.

Q. 77. Why didn't you leave it at 40 per cent.? It would have been much easier.

A. It would have resulted in a falling off of the duplicate, and our principle was to increase.

Q. 78. Why did you stop at 60 per cent. if your theory was right?

A. Our object was to equalize. I have stated we had a precedent for fixing at 60 per cent. and where we got that precedent.

Q. 79. Do you know anything about the rules outside of Cuyahoga county?

A. Not from practical connection with them, but from hearing. When a member of the board we visited Cincinnati and had talks with the members of the Cincinnati board two or three times. When our board was first organized we took a trip to Cincinnati in 1892, and we got the impression from that trip that that was the basis they were working on down there. I remember one member of the board said to our board that they considered the rules was to assess about 58 per cent. of its actual value in Cincinnati, and that they were fixing the valuation of personal property at about 60 per cent.

Q. 80. So what you have narrated of your information from other parts of the State is what you gathered from hearsay and unofficial statements of other members of the board?

A. Yes, and also some talk with members of the decennial State board of equalization in 1890.

104 Q. 81. All this transpired prior to the valuation of 1897 of these banks?

A. Yes.

Q. 82. None of this was since then?

A. No.

Q. 83. You don't know what the rule was in 1897 from information of this board or the other?

A. I am very sure I should have been aware if there had been any change in the rule.

Q. 84. You have not been in Cincinnati since these suits were begun on this business, or for a year prior to this suit—say during 1896?

A. I think we were there in the winter before I left the board. I believe it was in the winter of 1896.

Q. 85. That's another reason why you say you ignored the cash values, because somebody else had done that?

A. That's one reason. There were a great many reasons, I could not give them all. The action of the State board of equalization in 1890, as stated throughout the newspapers and through conversations with individual members of the board led me to believe that 60 per cent. was not above the average value of real estate.

Q. 86. Will you name any individual cases, where money in bank or stocks or bonds in this city, are only assessed at 60 per cent.?

A. I don't know as I have any personal knowledge. While I was a member of the board I could cite any number of cases.

Q. 87. Can you cite any during 1897? Any individual citizens that are only returning their stocks and bonds and moneys at 60 cents on the dollar? I wish you would give us a few.

A. From looking over the tax returns I am very sure I could. From memory I don't know as I can. If I should state it from memory it would be doing persons an injustice probably in not looking at the returns carefully. I am very sure a large number are doing so.

—. Do you advise clients and protect them in returning at 60 per cent., believing that is the law?

A. I advise them to make a return of that class of property at 60 per cent., and tell them that in accordance with the ordinary rules

of the board it will be accepted, and they will not be asked to pay more.

Q. 88. Name some of those that are returning that way.

A. I don't know that it would be proper for me to make out a list of my clients.

105 Q. 89. Your alleged city board didn't have anything to do with the Cuyahoga property outside of the city, did it?

A. No, sir.

Q. 90. Did you get any instructions from the county auditor at any time to return moneys at 60 per cent. of their value, or did you take any instructions from the auditor?

A. No, sir, we got no instructions of that kind.

Q. 91. Did you instruct the auditor?

A. No, we worked together. We often had talks on that line, and the auditor told us to be very careful about our 60 per cent. rule, and not put in on record.

Q. 92. You never found that officially?

A. I think we were rather careful.

Q. 93. You were very careful not to make an official record of this 60 per cent.?

A. There is nothing in our minutes in regard to that.

Q. 94. What was the purpose of that?

*Q. 95. What was the purpose of that?*

A. In the first place there wasn't any necessity for doing so.

Q. 96. If you should produce your records instead of testifying from memory, they would not show a 60 per cent. basis?

A. I don't think it would show that the board actually fixed such an amount as 60 per cent.

Q. 97. What did you use?

A. We said we fixed the value of such property at so much. We would take mining stock, for instance, and get their list value of stock marketed such a date, and fix the value at 60 per cent. of the cash value. We did not show that they were listed at 100 cents and fixed at 60.

Q. 98. Then that could not be told from your records at all?

A. No.

Q. 99. The first that your clients got the information was when you appeared before them afterwards and disclosed that?

A. That was no secret. It was common report and common knowledge. But we did not think it necessary to say so in our minutes.

Q. 100. Wasn't it because you didn't want to publicly violate the statute, and does not your record show?

A. Our record would show we fixed valuation at so much without saying whether that was in our opinion the true value of money, nor that it was in our opinion the proper tax value for the property. We didn't state that it was the true value or 0 or 50 per cent. of the true value.

106 Q. 101. Can you give the language of your entries on the question of fixing values?

A. Upon the proof presented before the board it fixes the valuation of such stock at so much; and that was carried on the 60 per cent. basis.

Q. 102. Did you make any findings to that effect?

A. Certainly not.

Q. 103. The auditor objected to your finding that at 60 per cent.?

A. I recollect some conversation with Mr. Akins, in which he thought it wasn't wise to have that shown. We never cared anything about that particular. Mr. Morgenthaler was always kicking on it and thought we ought not to use 60 per cent. basis.

Q. 104. The word "value" you used there then was one thing on the face and another thing secretly?

A. We generally used the term "taxable value."

Q. 105. And the statute defines taxable value as cash value, so that your records make you a law-abiding board.

A. (Witness made no audible answer.)

Redirect examination of THEODORE M. BATES.

By Judge BOYNTON:

Q. 106. The statute requires boards of equalization to equalize values?

A. Yes.

Q. 107. Equality and uniformity are provided also by the statute for taxation?

A. Yes.

Q. 108. How could you equalize values on the basis of actual value if other property throughout the State was listed far below its actual value? In other words, if you assessed personal property at its actual value, would there have been any equality or uniformity between that assessment and other assessments of similar property throughout the State?

A. I think not.

Recross-examination of THEODORE M. BATES.

By Mr. MONNETT:

Q. 109. Was it your business to equalize between Cuyahoga and the city of Cleveland, and other parts of the State?

A. No, sir, we did not consider it our duty to raise Cuyahoga county above—to raise the total valuation either of real estate or personal property so as to make the total valuation largely in excess of its proportion as fixed by the State decennial board.

Q. 110. You undertook to find out so as to bring yourself
107 up equal to the other boards of the State in values? Did you undertake to equalize your values beyond other boards of the State, or didn't you, or just between the different property-holders of the city?

A. We understood that Cuyahoga county and the city of Cleveland as a whole had been equalized by the State board of equaliza-

tion in real estate. We did not consider it our duty in actions upon real estate to raise the total valuation of the real estate, only to equalize it within the city of Cleveland and keep above the mark as required by law, that our total abatements should not exceed the additions.

Q. 111. You equalized between different wards in this city?

A. Yes.

Q. 112. You did not pretend to be acting as a State decennial board?

A. No, sir, but the total value of the real estate in the city of Cleveland having been fixed by the decennial board, and having been in our idea not to exceed 60 per cent. of its actual value, and our board having according to the statute jurisdiction over personal property and real estate, in equalizing and fixing the values of personal property on a par equal with real estate, we did not think we should bring the personal property up to 100 cents on the dollar, while the real estate was 60 per cent. We did not think that would be just to the tax-payers of the city of Cleveland in proportion to the other tax-payers of the State.

Q. 113. There is real estate in the city of Cleveland that is 100 cents on the dollar, and some about 40 cents on the dollar. Which did you take as a standard?

A. There wasn't any left that way when the supreme court knocked this board out. There wasn't any that way when I went off the board. We have reduced some on the West Side that previous to our action stood at 100 cents. There wasn't any left that way when I went off the board.

Q. 114. Don't you know, as a matter of fact and as a taxing officer, that the city of Cleveland and county of Cuyahoga is less than the other part of the State?

A. No, sir.

Q. 115. Is it, or is it not?

A. I don't think it varies very much from the rest of the State, so far as my knowledge and information is concerned. There are parties, I believe, right here on this very case, when this board was knocked out, the second ward in the city of Cleveland, I be-
108 lieve, is assessed way below what it should be, and I believe was at that time. I was a member of the board when they had the first 10 per cent.

Q. 116. And on the West Side property it is 100 cents on the dollar?

A. Yes, over in the vicinity where Mr. Cook lives there is property that the original assessment as levied upon, if our board had not interfered, it would be very nearly 100 cents on the dollar.

Q. 117. You could not bring the other property up to that?

A. No, sir, it would have been absolutely impossible. We would have been enjoined the next day, just as we were enjoined when we tried to bring up the second ward.

Q. 118. And because some of the property was below and some above, you struck a medium of 60 per cent.?

A. Yes, we spent a good deal of time endeavoring to discover

what the average was and bring that that was high down, and raise that which was low.

Q. 119. You didn't have any regard to what your duties *was* under the statute, except as to equalization?

A We considered that the total valuation of stocks had been practically fixed.

Q. 120. You are decreasing real estate?

A. Yes, and as a total we ought not to change it, and our duties in real estate were practically to equalize between each other, and it wasn't part of our duty to put personal property at 100 per cent. when we were forced to leave real estate at 60 per cent.

By Judge BOYNTON:

Q. 121. How did it happen property on the West Side was on the duplicate at 100 cents on the dollar of its valuation? Did it result from the fact of depreciation of property?

A. Yes, and partly from the fact that its original assessment was too high. Both causes worked together.

AUGUST 16TH, 1898—1.30 p. m.

Parties met pursuant to adjournment and resumed the taking of depositions.

Present: W. W. Boynton, counsel; N. T. Horr and E. S. Cook, solicitors for complainants; Frank S. Monnett, attorney general; Smith W. Bennett, assistant attorney general; P. H. Kaiser, solicitor for Cuyahoga county, Ohio, for respondents.

It is admitted by counsel on both sides that the book from
109 which the following data are taken is the "auditor of State's report" for 1897, made to the governor by W. D. Guilbert, auditor of State, December 24th, 1897.

Plaintiff offers from said book, on page 212, the first group of items entitled, "The value of all taxable real estate and personal property in Ohio, according to the consolidated tax duplicate of 1897." To which defendant objected. Objection noted.

Counsel reads from said book, page 212, as follows:

"The value of all taxable real estate and personal property in Ohio, according to the consolidated tax duplicate of 1897, is as follows:

| | |
|---|---|
| Real estate in cities and villages..... | $65,313,462 00 |
| Real estate not in cities and villages ..... | 591,598,409 00 |
| Chattel property..... ..... | 511,096,768 00 |
| Total taxable values in 1897 ..... | $1,748,008,639 00 |

Thereupon plaintiff offered in evidence from said book page 230 the following totals:

Same objection by defendant.

"TABLE VI.

*Abstract of the Personal Property, Moneys, and Credits as Returned by the Township Assessors and Equalized by the County and City Boards for the Year* 1897.

| Horses. | Cattle. | Mules. |
|---|---|---|
| $25,545,542 | $19,975,887 | $475,343 |
| **Sheep.** | **Hogs.** | **Carriages.** |
| $4,504,496 | $5,560,358 | $4,505,000 |

All other personal property subject to taxation and not included in any of the foregoing or subsequent items of this statement, $32,817,212.

| Watches. | Pianos and organs. | Merchants' stock. |
|---|---|---|
| $1,477,275 | $4,727,314 | $37,518,495 |

Value required to be listed as banker, broker or stock jobber, $482,023.

Manufacturers' stock, etc., $14,429,878.

Value of all moneys in possession or on deposit subject to order, $33,512,701.

Value of all credits after deducting all *bona fide* debts, $99,227,416.

All moneys invested in bonds, stocks, joint stock compa-
110 nies, annuities or otherwise, $7,611,124.

Dogs, value fixed by owner, $42,807.

Bank, railroad and other corporation property returned to county auditor, $204,519,999.

Total value of all taxable property except *per capita* tax on dogs, $496,932,869."

Plaintiff further introduced in evidence from the same book the following extract from Table No. XI, page 308, statement of valuation of property of the various railroad companies in the State of Ohio as fixed by the local boards for the year 1897, with additions and deductions, and total values as fixed by the State board of equalization for such property in accordance with provisions of sections 2770 to 2776, Revised Statutes. Table IX, page 310, action of State board, totals, $105,101,916.

Also from Table XI, page 326, the following extract:

*Statement of the Valuation of National Banks, as Returned to and Fixed by the State Board of Equalization of Bank Shares for 1897.*

| Name of bank. | City. | County. | Capital stock. | Surplus. | Undivided profits. | Total. | Value fixed by county auditors, exclusive of real estate. | Action of State board. | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | Value fixed by State board, exclusive of real estate. | Assessed value of real estate. | Aggregate value fixed. |
| Delphos | Delphos | Allen | $60,000 | $36,000 | $165 | $96,165 | $60,080 | $60,080 | $4,030 | $64,110 |
| First | Lima | " | 100,000 | ..... | 3,862 | 103,862 | 63,332 | 63,332 | ..... | 63,332 |
| Ohio | " | " | 120,000 | 9,000 | 15,046 | 144,046 | 93,386 | 93,386 | ..... | 93,386 |
| First | Ashland | Ashland | 50,000 | 20,000 | 2,505 | 72,505 | 34,700 | 34,700 | 11,250 | 45,950 |
| Farmers' | Ashtabula | Ashtabula | 150,000 | 30,000 | 86,074 | 266,074 | 249,080 | 156,080 | 16,994 | 173,074 |
| Marine | " | " | 50,000 | 10,000 | 3,875 | 63,875 | 59,365 | 37,365 | 4,510 | 41,875 |
| First | Conneaut | " | 50,000 | 200 | 2,150 | 52,350 | 47,541 | 29,541 | 4,808 | 34,349 |
| " | Geneva | " | 100,000 | 16,500 | 1,967 | 118,467 | 110,007 | 66,507 | 8,460 | 74,967 |
| " | Jefferson | " | 70,000 | 14,000 | 21,873 | 105,873 | 94,873 | 57,873 | 11,000 | 68,873 |
| " | Athens | Athens | 50,000 | 10,000 | 2,709 | 62,709 | 29,000 | 34,700 | 6,000 | 40,700 |
| " | St. Mary | Auglaize | 60,000 | 12,000 | 980 | 72,980 | 42,990 | 42,990 | 3,405 | 46,395 |
| " | Wapakoneta | " | 100,000 | 20,000 | 5,358 | 125,358 | 79,340 | 79,340 | 1,490 | 80,830 |
| People's | " | " | 100,000 | 20,000 | 9,819 | 129,819 | 70,580 | 70,580 | 13,150 | 83,730 |
| First | Barnesville | Belmont | 100,000 | 32,000 | 1,010 | 133,010 | 93,880 | 79,880 | 7,460 | 87,340 |
| People's | " | " | 100,000 | 20,000 | 437 | 120,437 | 76,640 | 76,640 | 1,920 | 78,560 |
| First | Bellaire | " | 200,000 | 27,057 | ..... | 227,057 | 135,440 | 135,440 | 12,150 | 147,590 |
| First | Belmont | " | 50,000 | 4,500 | 47 | 54,547 | 32,675 | 32,675 | 2,780 | 35,455 |
| First | Bridgeport | Belmont | 200,000 | 435 | 654 | 201,089 | 125,760 | 125,760 | 4,950 | 130,710 |
| " | Flushing | " | 50,000 | 1,000 | 712 | 51,712 | 32,040 | 24,220 | 1,580 | 25,800 |
| First | St. Clairsville | Belmont | 100,000 | 40,000 | 883 | 140,883 | 88,732 | 88,732 | 4,250 | 92,982 |

*Table XI*—Continued.

| Name of bank. | City. | County. | Capital stock. | Surplus. | Undivided profits. | Total. | Value fixed by county auditors, exclusive of real estate. | Action of State board. | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | Value fixed by State board, exclusive of real estate. | Assessed value of real estate. | Aggregate value fixed. |
| Second | St. Clairsville | Belmont | $50,000 | $2,500 | $3,127 | $55,627 | $33,375 | $33,375 | .... .... | $33,375 |
| First | Georgetown | Brown | 50,000 | 10,000 | 145 | 60,145 | 43,500 | 34,700 | $4,495 | 39,195 |
| Citizens' | Ripley | " ..... | 100,000 | 4,500 | 3,515 | 108,015 | 82,300 | 66,300 | 4,230 | 70,530 |
| Ripley | " ..... | " ..... | 100,000 | 80,000 | 1,098 | 181,098 | 140,950 | 112,950 | 5,210 | 118,160 |
| First | Hamilton | Butler | 100,000 | 85,000 | 1,827 | 186,827 | 117,180 | 121,180 | ..... | 121,180 |
| Miami Valley | " ..... | " ..... | 100,000 | 20,000 | 5,499 | 125,499 | 73,570 | 79,070 | ..... | 79,070 |
| Second | " ..... | " ..... | 100,000 | 50,000 | 2,787 | 152,787 | 83,930 | 88,930 | 10,180 | 99,110 |
| First | Middletown | " ..... | 150,000 | 50,000 | 17,050 | 217,050 | 132,830 | 132,830 | 5,400 | 138,230 |
| Merchants' | " .... | " ..... | 200,000 | 100,000 | 112,888 | 412,888 | 211,330 | 211,330 | 50,550 | 261,880 |
| First | Oxford | " ..... | 50,000 | 6,500 | 923 | 57,423 | 34,720 | 36,720 | .... .... | 36,720 |
| First | St. Paris | Champaign | 52,100 | 10,500 | 15,979 | 78,579 | 50,537 | 50,537 | 2,760 | 53,297 |
| Champaign | Urbana | " .. | 100,000 | 20,000 | 10,624 | 130,624 | 85,000 | 85,000 | 5,420 | 90,420 |
| Citizens' | " ..... | " .. | 100,000 | 60,000 | 27,170 | 187,170 | 109,000 | 109,000 | 13,760 | 122,760 |
| National | " ..... | " .. | 100,000 | 7,000 | 6,159 | 113,159 | 64,000 | 64,000 | 8,570 | 72,570 |
| First | Springfield | Clark | 400,000 | 135,000 | 5,328 | 540,338 | 351,211 | 351,211 | ..... | 351,211 |
| Lagonda | " ..... | " ..... | 100,000 | 43,000 | 15,245 | 158,245 | 88,618 | 88,618 | 14,240 | 102,858 |
| Mad River | " ..... | " ..... | 300,000 | 60,000 | 21,633 | 381,633 | 234,760 | 234,760 | 11,180 | 245,940 |
| 113 Second | Springfield | Clark | 200,000 | 120,000 | 2,381 | 322,381 | 195,907 | 195,907 | 13,240 | 209,147 |
| Springfield | " .... | " ..... | 100,000 | 20,000 | 2,533 | 122,533 | 72,974 | 72,974 | 6,320 | 79,294 |
| First | Batavia | Clermont | 80,000 | 16,000 | 3,108 | 99,108 | 56,540 | 60,040 | 3,875 | 63,915 |
| First | Felicity | " .... | 50,000 | 8,100 | 1,230 | 59,330 | 35,598 | 38,098 | ..... | 38,098 |
| Milford | Milford | " .... | 50,000 | 4,600 | 5,727 | 60,327 | 36,196 | 37,696 | ..... | 37,696 |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| First | New Richm'nd. | " | 80,000 | 20,000 | 3,135 | 103,135 | 59,181 | 61,681 | 4,500 | 66,181 |
| Clinton Co. | Wilmington | Clinton | 100,000 | 90,000 | 6,652 | 196,652 | 109,070 | 114,570 | 10,930 | 125,500 |
| First | " | " | 100,000 | 20,000 | 5,729 | 125,729 | 70,300 | 71,800 | 9,700 | 81,500 |
| First | E. Liverpool | Columbiana | 100,000 | 40,000 | 13,252 | 153,252 | 85,201 | 85,201 | 6,750 | 91,951 |
| Potters | " | " | 100,000 | 20,000 | 4,583 | 124,583 | 72,049 | 72,049 | 2,700 | 74,749 |
| First | Leetonia | " | 100,000 | 14,000 | 5,471 | 119,471 | 71,682 | 71,682 | ..... | 71,682 |
| First | Lisbon | " | 50,000 | 1,018 | 2,012 | 53,030 | 28,977 | 28,977 | 2,840 | 31,817 |
| Farmers' | Salem | " | 200,000 | 40,000 | 8,416 | 248,416 | 143,959 | 143,959 | 5,090 | 149,049 |
| First | " | " | 100,000 | 20,000 | 13,001 | 133,001 | 79,800 | 79,800 | ..... | 79,800 |
| First | Wellsville | " | 50,000 | 44,430 | 557 | 94,987 | 46,272 | 46,272 | 10,720 | 56,992 |
| First | Bucyrus | Crawford | 100,000 | 20,000 | 1,578 | 121,578 | 78,000 | 74,000 | 6,810 | 80,810 |
| Second | " | " | 60,000 | 483 | ..... | 60,483 | 38,000 | 38,000 | 4,140 | 42,140 |
| Citizens' | Galion | " | 60,000 | ..... | 2,398 | 62,398 | 39,000 | 39,000 | 4,280 | 43,280 |
| First | " | " | 50,000 | ..... | 13,011 | 63,011 | 34,000 | 34,000 | 10,250 | 44,250 |
| Galion | " | " | 60,000 | ..... | 2,511 | 62,511 | 38,000 | 38,000 | 5,840 | 43,840 |
| Central | Cleveland | Cuyahoga | 800,000 | ..... | 16,643 | 816,643 | 483,660 | 583,660 | ..... | 583,660 |
| Cleveland | " | " | 500,000 | ..... | ..... | 500,000 | 273,600 | 338,600 | 44,011 | 382,611 |
| Commercial | Cleveland | " | 1,500,000 | 66,024 | ..... | 1,566,024 | 926,790 | 1,166,790 | 21,350 | 1,188,140 |
| Euclid Ave. | " | " | 500,000 | 5,000 | ..... | 505,000 | 282,450 | 337,450 | 34,240 | 371,690 |
| First | " | " | 500,000 | 5,517 | ..... | 505,517 | 279,900 | 334,900 | 36,000 | 370,906 |
| Mercantile | " | " | 1,000,000 | ..... | 174,541 | 1,174,541 | 519,320 | 642,320 | 117,370 | 759,690 |
| Nat'l Commerce | " | " | 1,500,000 | ..... | 32,735 | 1,532,735 | 879,130 | 1,057,130 | 67,490 | 1,124,620 |
| " City | " | " | 250,000 | 150,000 | 19,869 | 419,869 | 250,460 | 327,460 | 2,370 | 329,830 |
| Park | " | " | 500,000 | ..... | 9,326 | 509,326 | 299,400 | 309,400 | ..... | 309,400 |
| State | " | " | 500,000 | ..... | 27,056 | 527,056 | 289,800 | 349,800 | 11,000 | 360,800 |
| Union | " | " | 1,000,000 | ..... | 46,044 | 1,046,044 | 627,600 | 744,600 | ..... | 744,600 |
| Western Reserve | " | " | 1,000,000 | ..... | 1,879 | 1,001,879 | 590,280 | 664,280 | ..... | 664,280 |
| First | Arcanum | Darke | 50,000 | 2,067 | 2,944 | 55,011 | 38,500 | 38,500 | ..... | 38,500 |
| Farmers' | Greenville | " | 84,000 | 50,000 | 7,720 | 141,720 | 86,800 | 86,800 | 7,040 | 93,840 |
| Second | " | " | 100,000 | 25,000 | 7,136 | 132,136 | 91,500 | 91,500 | ..... | 91,500 |
| First | Defiance | Defiance | 175,000 | 90,000 | 10,296 | 275,296 | 151,226 | 156,626 | 7,900 | 164,526 |
| 114 Merchants' | Defiance | Defiance | 100,000 | 1,000 | 3,669 | 104,669 | 60,027 | 60,027 | 1,860 | 61,887 |
| First | Hicksville | " | 50,000 | 4,721 | 2,599 | 57,320 | 32,695 | 32,695 | 1,090 | 33,785 |
| Delaware Co. | Delaware | Delaware | 100,000 | 200 | 2,225 | 102,425 | 72,410 | 72,410 | 4,590 | 77,000 |
| First | " | " | 100,000 | 20,000 | 1,719 | 121,719 | 81,030 | 75,000 | 9,970 | 84,970 |
| " | Huron | Erie | 50,000 | 1,810 | 3,049 | 54,859 | 32,915 | 32,915 | ..... | 32,915 |
| Citizens' | Sandusky | " | 100,000 | 25,000 | 6,000 | 131,000 | 76,962 | 76,962 | 2,730 | 79,692 |
| Moss | " | " | 150,000 | 15,000 | 1,472 | 166,472 | 95,029 | 95,029 | 8,070 | 103,099 |
| Second | " | " | 100,000 | 40,000 | 595 | 140,595 | 78,176 | 78,176 | 10,300 | 88,476 |

*Table XI*—Continued.

| Name of bank. | City. | County. | Capital stock. | Surplus. | Undivided profits. | Total. | Value fixed by county auditors, exclusive of real estate. | Action of State board. | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | Value fixed by State board, exclusive of real estate. | Assessed value of real estate. | Aggregate value fixed. |
| Third Exchange | Sandusky | Erie | $200,000 | $50,000 | $372 | $250,372 | $148,804 | $148,804 | $2,365 | $151,169 |
| Hocking Valley | Lancaster | Fairfield | 60,000 | 12,000 | 3,366 | 75,366 | 45,970 | 45,970 | 4,730 | 50,700 |
| Midland | Wash'g'n C. H. | Fayette | 50,000 | 3,000 | 5,004 | 58,004 | 33,670 | 33,670 | 1,330 | 35,000 |
| Deshler | Columbus | Franklin | 300,000 | 100,000 | 22,778 | 422,778 | 274,800 | 274,800 | ..... | 274,800 |
| Fourth | " | " | 100,000 | 18,500 | 27,500 | 146,000 | 94,900 | 76,200 | ..... | 76,200 |
| Clinton | " | " | 200,000 | 20,000 | 2,342 | 222,342 | 144,510 | 144,510 | ..... | 144,510 |
| Commercial | " | " | 200,000 | 10,000 | 9,608 | 219,608 | 136,240 | 125,805 | 3,940 | 129,745 |
| Hayden | " | " | 200,000 | 40,000 | 91 | 240,091 | 156,060 | 156,060 | ..... | 156,060 |
| Merchants' & Mfgs' | " | " | 350,000 | 15,000 | 12,278 | 377,278 | 219,770 | 219,770 | ..... | 219,770 |
| "The" | " | " | 300,000 | 30,000 | 35,812 | 365,812 | 219,400 | 124,400 | 11,600 | 136,000 |
| Centerville | Thurman | Gallia | 50,000 | 10,000 | 3,321 | 63,321 | 30,000 | 30,000 | ..... | 30,000 |
| First | Gallipolis | " | 50,000 | 10,000 | 904 | 60,904 | 32,500 | 32,500 | 6,600 | 39,100 |
| 115 First | Chardon | Geauga | 50,000 | 5,000 | 3,778 | 58,778 | 33,460 | 33,460 | 2,540 | 36,000 |
| Citizens' | Xenia | Greene | 100,000 | 40,000 | 15,317 | 155,317 | 95,500 | 95,500 | 4,500 | 100,000 |
| Xenia | " | " | 100,000 | 20,000 | 20,232 | 140,232 | 77,740 | 77,740 | 10,260 | 88,000 |
| Quaker City | Quaker City | Guernsey | 100,000 | 20,000 | 647 | 120,647 | 74,660 | 74,660 | 3,760 | 78,420 |
| Old | Cambridge | " | 100,000 | 20,000 | 4,031 | 124,031 | 78,550 | 78,550 | 2,070 | 80,620 |
| Central | " | " | 100,000 | 16,000 | 1,154 | 117,154 | 73,320 | 73,320 | 2,830 | 76,150 |
| Guernsey | " | " | 50,000 | 15,000 | 34 | 65,034 | 38,515 | 35,515 | 3,760 | 42,275 |
| Atlas | Cincinnati | Hamilton | 400,000 | 160,000 | 22,866 | 582,866 | 215,070 | 215,070 | 43,920 | 258,990 |
| Citizens' | " | " | 1,000,000 | 200,000 | 135,118 | 1,335,118 | 669,610 | 669,610 | 60,250 | 729,860 |
| Equitable | " | " | 350,000 | 100,000 | 17,671 | 467,671 | 289,230 | 289,230 | 2,820 | 292,050 |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| Fifth | " | " | 500,000 | | 25,839 | 525,839 | 323,010 | 238,954 | 6,680 | 245,634 |
| First | " | " | 1,200,000 | 240,000 | 200,763 | 1,640,763 | 874,890 | 874,890 | 94,110 | 969,000 |
| Fourth | " | " | 500,000 | 400,000 | 40,833 | 940,833 | 576,690 | 576,690 | | 576,690 |
| German | " | " | 500,000 | 300,000 | 73,200 | 873,200 | 482,190 | 482,190 | 9,990 | 492,180 |
| La Fayette | " | " | 600,000 | 400,000 | 159,133 | 1,159,133 | 641,130 | 641,130 | 23,640 | 664,770 |
| Market | " | " | 250,000 | 100,000 | 56,577 | 406,577 | 168,530 | 168,530 | 57,130 | 225,660 |
| Merchants' | " | " | 600,000 | 120,000 | 37,967 | 757,967 | 464,460 | 464,460 | 10,140 | 474,600 |
| Ohio Valley | " | " | 700,000 | 140,000 | 53,504 | 893,504 | 467,980 | 467,980 | | 467,980 |
| Second | " | " | 200,000 | 200,000 | 8,125 | 408,125 | 206,520 | 206,520 | 25,370 | 231,890 |
| Third | " | " | 1,200,000 | 320,000 | 128,239 | 1,648,239 | 839,160 | 839,160 | 57,050 | 896,210 |
| First | Lockland | " | 50,000 | 2,500 | 656 | 53,156 | 32,220 | 32,220 | | 32,220 |
| American | Findlay | Hancock | 100,000 | 5,600 | 929 | 106,529 | 53,647 | 53,647 | 10,270 | 63,917 |
| Farmers' | " | " | 115,000 | | | 115,000 | 58,885 | 58,885 | 20,515 | 74,400 |
| First | " | " | 150,000 | 8,500 | 9,587 | 168,087 | 56,112 | 56,112 | 44,740 | 100,852 |
| " | Kenton | Hardin | 50,000 | 49,500 | 309 | 99,809 | 59,885 | 59,885 | | 59,885 |
| Kenton | " | " | 50,000 | 2,500 | 170 | 52,670 | 27,200 | 27,200 | 4,390 | 31,590 |
| Farmers' & M'ch's' | Cadiz | Harrison | 50,000 | 29,000 | 1,272 | 80,272 | 37,655 | 37,655 | 18,535 | 56,190 |
| First | " | " | 120,000 | 24,000 | | 144,000 | 86,450 | 74,540 | 7,060 | 81,600 |
| Fourth | Cadiz | Harrison | 120,000 | 10,600 | 880 | 131,480 | 78,887 | 78,887 | | 78,887 |
| Harrison | " | " | 100,000 | 110,000 | 1,290 | 211,290 | 137,833 | 120,313 | 10,090 | 130,403 |
| Merchants' | Hillsboro | Highland | 100,000 | 10,000 | 2,128 | 112,128 | 65,000 | 65,000 | | 65,000 |
| First | Monroeville | Huron | 50,000 | 10,000 | 5,656 | 65,656 | 37,729 | 37,729 | 2,050 | 39,779 |
| " | Norwalk | " | 50,000 | 10,050 | 8,079 | 68,129 | 38,058 | 38,058 | 3,350 | 41,408 |
| Norwalk | " | " | 100,000 | 20,000 | 28,028 | 148,028 | 90,933 | 90,933 | | 90,933 |
| New London | New London | " | 50,000 | 3,650 | 6,050 | 59,700 | 35,313 | 35,313 | 1,500 | 36,813 |
| First | Plymouth | " | 50,000 | 10,000 | 710 | 60,710 | 35,669 | 35,669 | 2,500 | 38,169 |
| 116 First | Jackson | Jackson | 50,000 | 10,000 | 5,247 | 65,247 | 28,699 | 31,699 | 6,301 | 38,000 |
| " | Wellston | " | 50,000 | 6,000 | 1,881 | 57,881 | 24,507 | 24,507 | 10,493 | 35,000 |
| First | Mt. Pleasant | Jefferson | 175,000 | 35,000 | 1,109 | 211,109 | 136,600 | 136,600 | 600 | 137,200 |
| " | Smithfield | " | 100,000 | 17,300 | 9,712 | 127,012 | 72,250 | 72,250 | 10,310 | 82,560 |
| Commercial | Steubenville | " | 125,000 | 723 | 8,790 | 134,513 | 77,200 | 77,200 | 10,210 | 87,410 |
| National Exchange | " | " | 100,000 | 25,000 | 11,004 | 136,004 | 88,400 | 88,400 | | 88,400 |
| Steubenville | " | " | 125,000 | 40,000 | 12,491 | 177,491 | 106,300 | 106,300 | 9,030 | 115,330 |
| First | Mt. Vernon | Knox | 50,000 | 15,000 | 2,193 | 67,193 | 30,487 | 30,487 | 16,381 | 46,868 |
| Knox | " | " | 50,000 | 6,800 | 3,314 | 60,114 | 36,069 | 36,069 | | 36,069 |
| Painesville | Painesville | Lake | 200,000 | 16,600 | 9,648 | 226,248 | 127,000 | 127,000 | 8,850 | 135,850 |
| Citizens' | Ironton | Lawrence | 100,000 | 10,000 | 5,656 | 115,656 | 58,730 | 58,730 | 1,270 | 60,000 |
| First | " | " | 300,000 | 8,035 | 9,548 | 317,583 | 171,320 | 171,320 | 8,680 | 180,000 |
| Second | " | " | 250,000 | 30,600 | 3,838 | 284,438 | 122,340 | 122,340 | 27,660 | 150,000 |

*Table XI*—Continued.

| Name of bank. | City. | County. | Capital stock. | Surplus. | Undivided profits. | Total. | Value fixed by county auditors, exclusive of real estate. | Action of State board. | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | Value fixed by State board, exclusive of real estate. | Assessed value of real estate. | Aggregate value fixed. |
| First | Newark | Licking | $100,000 | ..... | $8,175 | $108,175 | $61,815 | $61,815 | $8,500 | $70,315 |
| People's | Newark | Licking | 150,000 | $30,000 | 28,746 | 208,746 | 135,685 | 135,685 | ..... | 135,685 |
| Bellefontaine | Bellefontaine | Logan | 100,000 | 21,500 | 4,066 | 125,566 | 73,690 | 73,690 | 9,180 | 82,870 |
| People's | " | " | 100,000 | 25,000 | 18,198 | 143,198 | 94,510 | 94,510 | ..... | 94,510 |
| "The" | Elyria | Lorain | 150,000 | 35,000 | 3,559 | 188,559 | 106,096 | 106,096 | 7,010 | 113,106 |
| Citizens' | Oberlin | " | 60,000 | 15,000 | 2,391 | 77,391 | 46,423 | 46,423 | ..... | 46,423 |
| First | Wellington | " | 100,000 | 5,000 | 124 | 105,124 | 56,799 | 56,799 | 6,270 | 63,069 |
| 117 First | Toledo | Lucas | 500,000 | 600,000 | 137,114 | 1,237,114 | 714,710 | 714,710 | 27,490 | 742,200 |
| Holcomb | " | " | 300,000 | 75,000 | 10,028 | 385,028 | 230,920 | 230,920 | ..... | 230,920 |
| Ketchum | " | " | 250,000 | 50,000 | 18,591 | 318,591 | 171,054 | 171,054 | 13,130 | 184,184 |
| Merchants' | " | " | 300,000 | 180,000 | 12,205 | 492,205 | 273,842 | 273,842 | 23,790 | 297,632 |
| Northern | " | " | 300,000 | 160,000 | 9,350 | 469,350 | 280,176 | 280,176 | 1,360 | 281,536 |
| Second | " | " | 350,000 | 650,000 | 50,397 | 1,050,397 | 623,840 | 623,840 | 6,380 | 630,220 |
| Madison | London | Madison | 120,000 | 24,000 | 1,248 | 145,248 | 92,110 | 92,110 | 3,890 | 96,000 |
| Farmers' | Canfield | Mahoning | 50,000 | 10,000 | 8,490 | 68,490 | 39,960 | 39,960 | 1,130 | 41,090 |
| Commercial | Youngstown | " | 200,000 | 34,000 | ..... | 234,000 | 140,400 | 140,400 | ..... | 140,000 |
| Mahoning | " | " | 229,000 | ..... | 62,062 | 291,062 | 157,540 | 157,540 | 17,100 | 174,640 |
| First | " | " | 500,000 | 100,000 | 17,784 | 617,784 | 357,450 | 357,450 | 13,220 | 370,670 |
| Second | " | " | 200,000 | 110,947 | 31,960 | 342,907 | 183,800 | 183,800 | 21,940 | 205,740 |
| Wick | " | " | 300,000 | ..... | 10,987 | 310,987 | 154,090 | 154,090 | 32,500 | 186,590 |
| Middleport | Middleport | Meigs | 50,000 | 3,100 | 1,257 | 54,357 | 31,050 | 31,050 | 1,565 | 32,615 |
| Pomeroy | Pomeroy | " | 50,000 | 3,000 | 3,679 | 56,679 | 30,950 | 30,950 | 5,154 | 36,104 |

| | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Old Phœnix | Medina | Medina | 75,000 | 6,000 | 3,717 | 84,717 | 50,000 | 50,000 | | | 50,000 |
| Citizens' | Piqua | Miami | 150,000 | 30,000 | 22,815 | 202,815 | 123,655 | 123,655 | 4,860 | | 128,515 |
| Piqua | " | " | 200,000 | 40,000 | 43,391 | 283,391 | 181,609 | 181,609 | 5,910 | | 187,519 |
| Third | " | " | 100,000 | 12,000 | 4,335 | 116,335 | 65,217 | 65,217 | 9,560 | | 74,777 |
| Tipp | Tipp City | " | 60,000 | 12,000 | 7,763 | 79,763 | 52,661 | 52,661 | 1,560 | | 54,221 |
| First | Troy | " | 200,000 | 40,000 | 12,410 | 252,410 | 168,208 | 168,208 | 3,150 | | 171,358 |
| Troy | " | " | 100,000 | 20,000 | 8,813 | 128,813 | 85,134 | 85,134 | | | 85,134 |
| First | Malta | Morgan | 75,000 | 4,600 | 1,922 | 81,522 | 49,335 | 49,335 | 3,165 | | 52,500 |
| First | McCon'lsville | " | 100,000 | 16,000 | 766 | 116,766 | 80,000 | 76,000 | | | 76,000 |
| City | Dayton | Montgomery | 200,000 | 60,000 | 39,136 | 299,136 | 202,994 | 202,994 | 6,743 | | 209,737 |
| Dayton | " | " | 300,000 | 60,000 | 17,893 | 377,893 | 264,504 | 264,504 | | | 264,504 |
| Fourth | " | " | 600,000 | 120,000 | 11,848 | 731,848 | 512,293 | 512,293 | | | 512,293 |
| Merchants' | " | " | 300,000 | 60,000 | 5,974 | 365,974 | 255,681 | 255,681 | | | 255,681 |
| Teutonia | " | " | 200,000 | 28,000 | 5,897 | 233,897 | 163,713 | 163,713 | | | 163,713 |
| Third | " | " | 400,000 | 100,000 | 34,933 | 534,933 | 359,382 | 359,382 | 9,070 | | 368,452 |
| Winters' | " | " | 500,000 | 132,000 | 6,015 | 638,015 | 441,349 | 441,349 | 5,340 | | 446,689 |
| First | Germantown | " | 50,000 | 15,000 | 3,326 | 68,326 | 45,438 | 45,438 | 2,390 | | 47,828 |
| Citizens' | Miamisburg | Montgomery | 100,000 | 20,000 | 53 | 120,053 | 84,037 | 84,037 | | | 84,037 |
| First | " | " | 100,000 | 50,000 | 25,548 | 175,548 | 122,882 | 122,882 | | | 122,882 |
| " | Cardington | Morrow | 60,000 | 20,000 | 187 | 80,187 | 41,975 | 41,975 | 6,025 | | 48,000 |
| First | Mt. Gilead | " | 50,000 | 5,500 | 5,639 | 61,139 | 35,970 | 35,970 | 1,530 | | 37,500 |
| 118 Morrow Co | Mt. Gilead | Morrow | 50,090 | 10,000 | 1,465 | 61,465 | 35,250 | 35,250 | 2,250 | | 37,500 |
| Citizens' | Zanesville | Muskingum | 200,000 | 50,000 | 24,909 | 274,909 | 147,147 | 149,147 | 15,020 | | 164,167 |
| First | " | " | 200,000 | 110,000 | 41,911 | 351,911 | 197,171 | 197,171 | 14,730 | | 211,901 |
| Union | " | " | 150,000 | 18,000 | 11,269 | 179,269 | 97,687 | 100,687 | 4,500 | | 105,187 |
| Noble Co | Caldwell | Noble | 60,000 | 28,000 | 16,829 | 104,829 | 60,918 | 60,918 | 7,220 | | 68,138 |
| First | Circleville | Pickaway | 139,000 | 60,000 | 1,873 | 191,873 | 99,400 | 99,400 | 15,700 | | 115,100 |
| Second | " | " | 125,000 | 62,500 | 4,883 | 192,383 | 107,380 | 107,380 | 8,040 | | 115,420 |
| Third | " | " | 100,000 | 16,000 | 1,320 | 117,320 | 70,000 | 70,000 | | | 70,000 |
| First | Garrettsville | Portage | 80,000 | 10,682 | 2,421 | 93,103 | 57,028 | 57,028 | 8,370 | | 65,398 |
| Kent | Kent | " | 60,000 | 12,000 | 2,143 | 74,143 | 42,780 | 42,780 | 6,560 | | 49,340 |
| First | Ravenna | " | 100,000 | 20,000 | 7,639 | 127,639 | 75,950 | 75,950 | 7,530 | | 83,480 |
| Second | " | " | 150,000 | 25,600 | 12,006 | 187,606 | 116,871 | 116,871 | 6,170 | | 123,041 |
| Preble Co | Eaton | Preble | 50,000 | 8,500 | 1,579 | 60,079 | 40,000 | 40,000 | | | 40,000 |
| Citizens' | Mansfield | Richland | 100,000 | 40,000 | 5,874 | 145,874 | 102,110 | 92,410 | | | 92,610 |
| Farmers' | " | " | 150,000 | 5,000 | 6,023 | 1 1,023 | 104,920 | 96,920 | 7,800 | | 104,720 |
| First | Shelby | " | 50,000 | 20,000 | 1,245 | 71,245 | 45,700 | 43,700 | 4,170 | | 47,870 |
| Central | Chillicothe | Ross | 100,000 | 50,000 | 7,058 | 157,058 | 101,650 | 101,650 | 770 | | 102,420 |
| First | " | " | 150,000 | 130,000 | 6,903 | 286,903 | 181,556 | 181,556 | 4,930 | | 186,486 |

*Table XI*—Continued.

| Name of bank. | City. | County. | Capital stock. | Surplus. | Undivided profits. | Total. | Value fixed by county auditors, exclusive of real estate. | Action of State board. | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | Value fixed by State board, exclusive of real estate. | Assessed value of real estate. | Aggregate value fixed. |
| Ross county | Chillicothe | Ross | $150,000 | ..... | $72,227 | $222,227 | $143,148 | $143,148 | ..... | $143,148 |
| First | Bellevue | Sandusky | 50,000 | $10,000 | 11,689 | 71,689 | 43,010 | 43,010 | ..... | 43,010 |
| 119 First | Clyde | Sandusky | 50,000 | 3,650 | 506 | 54,156 | 31,120 | 31,120 | $1,370 | 32,490 |
| " | Fremont | " | 100,000 | 21,000 | 489 | 121,489 | 57,990 | 57,990 | 14,900 | 72,890 |
| First | Portsmouth | Scioto | 100,000 | 18,500 | 12,250 | 130,750 | 58,610 | 63,610 | 10,260 | 73,870 |
| Portsmouth | " | " | 125,000 | 26,750 | 289 | 152,039 | 81,640 | 81,640 | 9,510 | 91,150 |
| First | Fostoria | Seneca | 50,000 | 10,000 | 4,905 | 64,905 | 40,880 | 40,880 | ..... | 40,880 |
| Tiffin | Tiffin | " | 250,000 | 50,000 | 533 | 300,533 | 187,100 | 187,100 | 8,240 | 195,340 |
| First | Alliance | Stark | 100,000 | 10,800 | 2,588 | 113,388 | 71,860 | 71,860 | 1,846 | 73,706 |
| City | Canton | " | 200,000 | 40,000 | ..... | 240,000 | 107,760 | 107,760 | 48,240 | 156,000 |
| First | " | " | 200,000 | 10,986 | 8,615 | 219,601 | 122,120 | 122,120 | 20,620 | 142,740 |
| " | Massillon | " | 150,000 | 50,000 | 4,875 | 204,875 | 129,260 | 129,260 | 3,920 | 133,180 |
| Merchants' | " | " | 150,000 | 30,000 | 9,964 | 189,964 | 116,220 | 116,220 | 4,990 | 121,210 |
| Union | " | " | 150,000 | 30,000 | 3,731 | 183,731 | 115,455 | 115,455 | 3,970 | 119,425 |
| Citizens' | Akron | Summit | 150,000 | 17,500 | 1,278 | 168,778 | 111,390 | 109,890 | ..... | 109,890 |
| City | " | " | 200,000 | ..... | 11,750 | 211,750 | 139,750 | 134,250 | ..... | 134,250 |
| First | " | " | 100,000 | 50,000 | 44,685 | 194,685 | 122,590 | 115,090 | 5,910 | 121,000 |
| Second | " | " | 275,000 | 56,000 | 6,892 | 337,892 | 223,000 | 203,000 | ..... | 203,000 |
| First | Cortland | Trumbull | 50,000 | 4,500 | 6,782 | 61,282 | 38,320 | 38,320 | 1,500 | 39,820 |
| " | Girard | " | 50,000 | 5,000 | 1,582 | 56,582 | 35,030 | 35,030 | 1,570 | 36,600 |
| Kinsman | Kinsman | " | 50,000 | 7,600 | 9,699 | 67,299 | 38,570 | 38,570 | 5,180 | 43,750 |
| City | Niles | " | 60,000 | 2,000 | 4,085 | 66,085 | 39,960 | 39,960 | 2,970 | 42,930 |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| First | " | " | 50,000 | 10,000 | 4,056 | 64,056 | 41,650 | 41,650 | | 41,650 |
| " | Warren | " | 150,000 | 30,000 | 23,385 | 203,385 | 118,120 | 118,120 | 14,080 | 132,200 |
| Second | " | " | 100,000 | 30,000 | 19,101 | 149,101 | 86,700 | 86,700 | 7,200 | 93,900 |
| Western Reserve | " | " | 100,000 | 20,000 | 21,497 | 141,497 | 78,780 | 78,780 | 6,120 | 84,900 |
| Exchange | Canal Dover | Tuscarawas | 50,000 | 10,000 | 2,253 | 62,253 | 35,607 | 35,607 | 1,743 | 37,350 |
| First | " | " | 50,000 | 9,000 | 252 | 59,252 | 34,988 | 34,988 | 562 | 35,550 |
| Citizens' | New Philadel'a | " | 50,000 | 2,644 | 500 | 53,144 | 27,213 | 27,213 | 3,110 | 30,323 |
| First | Van Wert | Van Wert | 60,000 | 34,000 | 4,826 | 98,826 | 58,330 | 58,330 | 3,740 | 62,070 |
| Van Wert | " | " | 100,000 | 50,000 | 6,974 | 156,974 | 95,410 | 95,410 | 2,670 | 98,080 |
| Vinton County | McArthur | Vinton | 50,000 | 10,000 | 3,401 | 63,401 | 25,500 | 25,500 | 16,900 | 42,400 |
| Citizens' | Marietta | Washington | 100,000 | 20,000 | 9,532 | 129,532 | 89,240 | 74,240 | 10,760 | 85,000 |
| First | " | " | 150,000 | 30,000 | 41,678 | 221,678 | 144,560 | 129,560 | 15,440 | 145,000 |
| Citizens' | Lebanon | Warren | 50,000 | 2,300 | 941 | 53,241 | 34,607 | 34,607 | | 34,607 |
| Lebanon | " | " | 50,000 | 35,000 | 5,114 | 90,114 | 55,364 | 55,364 | 3,210 | 58,574 |
| Waynesville | Waynesville | " | 50,000 | 12,500 | 5,805 | 68,305 | 44,398 | 44,398 | | 44,398 |
| Wayne County | Wooster | Wayne | 100,000 | 40,000 | 3,878 | 143,878 | 87,430 | 87,430 | 5,570 | 93,000 |
| 120 Wooster | Wooster | Wayne | 100,000 | 9,800 | 4,512 | 114,312 | 68,150 | 68,150 | 5,850 | 74,000 |
| Farmers' | Bryan | Williams | 50,000 | 20,500 | 1,597 | 72,097 | 42,325 | 42,325 | 2,090 | 44,415 |
| First | Bryan | Williams | 60,000 | 21,000 | 3,702 | 84,702 | 48,561 | 48,561 | 5,190 | 53,751 |
| " | Bowling Green | Wood | 50,000 | 5,000 | 3,865 | 58,865 | 33,195 | 33,195 | 2,120 | 35,315 |
| " | N. Baltimore | " | 60,000 | 4,000 | 1,613 | 65,613 | 35,206 | 35,206 | 4,160 | 39,366 |
| " | Upp'r Sand'sky | Wyandot | 105,000 | 40,000 | 6,390 | 151,390 | 99,180 | 79,180 | 5,820 | 85,000 |
| Totals | | | $44,980,100 | $10,287,079 | $3,418,942 | $58,686,121 | $34,350,667 | $34,918,426 | $2,071,721 | $36,990,147 |

121 Also from Table XII, page 335, the following:

Statement of valuation of State banks as returned to and fixed by the State board of equalization of bank shares for 1897, total (page 339), $8,410,780.

Also from Table XV, page 377, the following:

The following table shows the aggregate valuation of the property (including real estate) of express, telegraph, and telephone companies for taxation in each county, and grand total in the State, as fixed and apportioned by the State board of appraisers and assessors of express, telegraph and telephone companies, under an act passed May 10th, 1894, known as the Nichols law. Page 389, recapitulation total in State, $5,986,626.

Defendant moved the court to strike out as incompetent and irrelevant all testimony hereinbefore offered on property outside of Cuyahoga county.

Thereupon plaintiff offered in evidence extracts from a book entitled, "11th Census of the United States, 1890."

It is admitted that the book with the above title is what it purports to be, a report of real-estate mortgages in the United States at the 11th census, 1890.

Defendant objected to the offer of any of the contents of said book on the ground that the same are incompetent and irrelevant.

Counsel here read in evidence from page 94 of said census the following:

Table 29, number and amount of real-estate mortgages in force at five specified dates by States and Territories, to wit, 1886, 1887, 1888, 1889, 1890.

Ohio, 1890, No. of mortgages, 271,055, amount $259,842,188.

Also table 107, page 742 of said census, real-estate mortgage debt in force January 1, 1890, by counties.

Ohio, $259,842,188.

| | |
|---|---|
| On acres | 134,107,706 |
| On lots | 125,734,482 |
| In Cuyahoga Co. | 21,795,654 |
| On acres | 2,806,468 |
| On lots | $18,989,186 |

Also on page 94 of said census, table 29, number and amount of real-estate mortgages in force at five specified dates by States and Territories above recited.

Kansas, 1890, number of mortgages 298,884, amount $243,146,826.

Also table 107, page 735 of said census, real-estate mortgage debt in force January 1, 1890, by counties.

| | | |
|---|---|---|
| 122 | Kansas | $243,146,826 |
| | On acres | 174,720,071 |
| | On lots | 68,426,755 |

Defendant objected to the above testimony and moved the court to withdraw the same from the record on the ground that the same is incompetent and irrelevant to the issues made.

Thereupon the plaintiff offered in evidence testimony taken from a book entitled, "Ohio Building and Loan Association Report, 1897."

It is admitted that the report from which the following data are taken is the Annual Report of the Inspector of Building and Loan Associations of the State of Ohio for the fiscal year ending December 31, 1896.

Defendant objected to the introduction of any testimony from said book as incompetent and irrelevant.

Thereupon plaintiff read from page 21 of said book: Summary of annual reports tabulated.—The following tables contain a summary of the statements of associations reporting, and tabulated comparison with the preceding year, and per cent. of increase and decrease:

Capital stock, organization, and plan of association.

| | |
|---|---|
| Authorized capital stock, 1896 | $793,000,000 |
| Subscribed capital stock, 1896 | 300,435,571 |
| Capital stock paid in, 1896 | 80,175,163 71 |
| Total number of non-borrowing members, 1896 | 216,372 |
| Total number of borrowing members | 81,288 |
| Total membership | 297,660 |
| Percentage of borrowing members to total membership | 27.30 |

Record of shares, total number of shares of stock in force at the close of the association's fiscal year ending in 1896, 1,389,059 shares.

Present total number of shares upon which loans have been made, 410,176 shares.

To which testimony defendant objected and moved the court to strike the same from the record and withdraw the same upon the ground that it is incompetent and irrelevant.

123 U. S. Circuit Court, N. D. Ohio, E. D.

THE MERCANTILE NATIONAL BANK *vs.* R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio. } No. 5714. Stipulation.

Admitted that the printed volume of the Report of the Auditor of the State of Ohio for 1897 shall be received and used as evidence of what it contains so far as competent, relevant and applicable to any issue involved in the above-entitled cause, and have the same effect as if the entries therefrom offered in evidence had been duly certified by him under the seal of his office.

It is admitted and stipulated that the volume of Census Reports for 1890, heretofore offered in evidence in the above-entitled cause, shall be received and used in effect so far as competent, relevant and applicable to any issue involved in said cause with the same effect as if the entries therefrom offered in evidence had been properly certified and authenticated by the officer of the United States authorized to authenticate and certify copies of the census reports

for use as evidence under the seal of his office in the courts. And the parties make a like stipulation with reference to the report offered in evidence of the Comptroller of the Currency.

It is admitted and stipulated that the volume of the Ohio Building and Loan Association Report of 1896, above offered in evidence, shall be received and used as evidence of what it contains so far as competent, relevant or applicable in the above-entitled cause, and have the same effect as if the entries therefrom offered in evidence had been duly certified and authenticated under seal of his office by the superintendent or inspector of building and loan associations in Ohio.

P. H. KAISER AND
F. S. MONNETT,
*Of Counsel for Defts.*

W. W. BOYNTON.

Plaintiff further read in evidence in connection with the testimony of this witness extract of Annual Report of Auditor of State (which book was heretofore admitted by all parties as being the Auditor of State's Report for 1897), reading as follows on page 340, table 13: Report of the condition of the various banking institutions or incorporations engaged in the business of banking,
124 organized under the laws of the State of Ohio before the commencement of business on the first Monday of October, 1897, as required by sections 3817–'18–'19–'20, Revised Statutes (page 346):

| | |
|---|---|
| Cleveland, Ohio, Broadway Savings & Loan Co. individual deposits | $1,682,685 62 |
| Cleveland Savings & Banking Co. individual dep. | 58,891 30 |
| Cleveland Trust Co. individual deposits | 2,576,582 24 |
| Columbia Savings & Loan Co. individual deposits | 244,106 54 |
| Cuyahoga Savings & Banking Co. individual deposits. | 136,199 86 |
| The Detroit Street Savings & Loan Co. individual deposits | 251,749 50 |
| The Dime Savings & Banking Co. individual dep. | 2,463,268 21 |
| The East End Savings Bank Co. individual dep. | 1,425,139 20 |
| The Euclid Ave. Savings & Banking Co. individual dep. | 504,676 64 |
| The Forest City Sav. Bank Co. individual dep. | 619,537 |
| The Garfield Savings Bank Co. individual dep. | 344,321 18 |
| The German-American Sav. Bank Co. individual dep. | 324,861 72 |
| The Guardian Trust Co. individual dep. | 952,796 42 |
| The Lake Shore Banking & Sav. Co. individual dep. | 446,641 76 |
| The Lorain Street Savings & Banking Co. individual dep. | 534,816 93 |
| The Pearl St. Savings & Loan Co. individual dep. | 654,039 24 |
| The Savings & Trust Co. individual dep. | 4,245,494 54 |
| The United Banking & Savings Co. individual dep. | 1,119,882 87 |
| The Woodland Ave. Sav. & Loan Co. individual dep. | 1,470,060 39 |
| The Society for Savings individual dep. | 25,473,436 22 |
| The Cleveland Trust Co. individual dep. | 2,576,582 |
| The Marine Bank Co. individual dep. | 331,239 |

| | | | |
|---|---|---|---|
| The South Cleveland Banking Co. individual dep..... | | 711,507 | |
| The Wade Park Banking Co. individual dep..... | | 617,949 | 57 |
| The West Cleveland Banking Co. individual dep..... | | 97,399 | 40 |
| 125 The Wick Banking & Trust Co. individual dep..... | | 558,860 | |

To all of which testimony defendant objected and moved the court to take the same from the record.

ALBERT E. AKINS, a witness produced on behalf of said complainant, being duly sworn, deposes and says as follows:

Direct examination.

By Judge BOYNTON:

Q. 1. What is your name?

A. Albert E. Akins.

Q. 2. What is your occupation?

A. At the present time county auditor of Cuyahoga county.

Q. 3. How long have you been auditor?

A. This present term commenced on the second Monday of September, 1896.

Q. 4. You have been auditor before?

A. Yes.

Q. 5. Covering what years?

A. From the second Monday in September, 1890, to the same time in 1893.

Q. 6. Are you familiar with the percentage of the actual value usually assessed upon moneyed capital in the city of Cleveland and county of Cuyahoga, such as bonds, stocks, promissory notes, credits, and the like?

A. I am familiar with the customs that are used for taxation.

Q. 7. How long have these customs been in vogue with reference to percentage?

A. The customs during my knowledge of affairs in the auditor's department are no different than they were prior to my time, that I know of.

Q. 8. The same as they have been for years?

A. Yes, I should say so.

Q. 9. What percentage of actual valuation of the securities above named have they been listed at or taxed upon?

Defendant objected to witness as an official giving any percentage, or his opinion on any percentage, or any amount other than the statute fixes under section- 2739 and 2749.

A. To answer that question I would have to explain a little; I believe there has been a misunderstanding in the minds of
126 some, both tax-payers and others, as to why they were using a per cent. I never have admitted as an official that we were using a percentage only to arrive at the actual value of a thing. I know the common talk is taking 50 per cent. or 60 per cent. or 40

per cent.—60 is the more usual per cent. But I have always used that as a per cent. to arrive at true values.

Q. 10. What percentage of the actual value which you seem to call the real value have promissory notes, bonds, stocks and credits been placed upon the duplicate at?

Defendant objected to the answer because the witness has stated that the value fixed was the statutory value.

A. Promissory notes or bonds or any credit, you have to use a percentage of its face value as you find its true value. It may be one value or another. The officers must tax a thing according to its true value. It may not be over ten per cent. of its face value. The statute so requires.

Q. 11. Suppose a promissory note of $10,000 given by a man responsible is placed before you as auditor for the assessment of its value for taxation. What would you put it in at, following the customs that have existed in Cuyahoga county and the city of Cleveland for years past?

A. If the officials found that it was listed at 60 per cent. of its face, they would allow it to pass.

Q. 12. Is it not true that all securities of an apparent value, if they were good were put in at that same percentage?

To which question defendant objected as leading, and as being cross-examination.

A. I think that was about the rule that was used to arrive at its true value in money. The question is always asked "What is true value in money of a thing?" I have heard this rule used; if a thing was valued and was sold for about two-thirds by forced sale, that is its true value in money, and that its face value was not always its true value, and that it was always considered here, and has been, that about a two-thirds rule was as high as they were to pass and call that its true value in money.

Q. 13. Is it not true that the board of equalization of this county and city have adopted, without formulating it as a rule, 60 per cent. of the face or actual value, 50 per cent. of the face value of perfectly good securities as their taxable value?

A. I think the board was working upon that tacit understanding.

Q. 14. They did not, however, put it down as a rule?

A. I think they took it as an understanding.

127 Q. 15. And where there were additions that you made to the duplicate, where you found men had innocently omitted to make a return, at what valuation did you put them in reference to their face value?

Same objection by defendant.

A. As it strikes me, I would say that one of the differences of opinion existing between the board of equalization and myself was upon that subject. I never used any absolute rule in valuing anything, unless I found the property to exist, which I believe is the

only rule that an officer can abide by under the law. If I found one thing was more valuable than another, I used a greater value.

Q. 16. You assessed the value of the national bank shares in 1897 in this city?

A. Yes.

Q. 17. At what value with reference to their face or actual value—what percentage did you adopt?

A. We did not adopt an absolute percentage. Various things enter into the assessment of each bank. They run anywhere from 50 per cent. to 65 per cent.

Q. 18. Did you not take the capital and surplus at the banks and deduct the real estate and take 60 per cent. of the remainder?

A. It was somewhere as I say from 50 per cent. to 65 per cent. We didn't use the same rule.

Q. 19. Why did you adopt from 50 per cent. to 65 per cent. in assessing the value of these shares, if such was not the amount or percentage fixed for other moneyed capital in the city of Cleveland and Cuyahoga county?

A. I had that in view as being taxed as high as other property in fixing it, and at the same time I fixed it in many cases as high as they were worth. I believe I have done so this year.

Q. 20. Which one of your deputies did the figuring?

A. O. L. Jones does the actual figuring, but I go over with him

Q. 21. Did you change the results at all that were fixed by Jones? the various points.

A. Yes, frequently.

Q. 22. Did you in 1897?

A. I presume so. I have in 1898. We would arrive at a result and raise or lower according to other circumstances.

Q. 23. In 1897 did you change the results made by Jones?

A. Yes, there is no work of that kind I let pass with any man in the office. It is always a question of understanding and we
128 called this year some men before us from every bank that we had any question about, and examined him on the matter before we came to our conclusion.

Q. 24. What did you say as to assessing the bank shares in 1897 as respects their value?

A. I said we calculated to have them somewhere from 50 per cent. to 65 per cent. of their face value and we thought that it was taxing them as high as other property.

Q. 25. What do you mean by other property?

A. All other property or any other property.

Q. 26. Money, capital, bonds, stocks and credits?

A. Yes, and other property, any property.

Q. 27. The valuation fixed upon the shares of the various national banks in the city for 1897, would you say was the full average of the money valuation fixed upon other capital?

A. That's my opinion.

Q. 28. Is it your opinion now?

A. It is.

Cross-examination of ALBERT E. AKINS.

By Mr. MONNETT:

Q. 29. You never gave any instructions to Mr. Bates or to their board to assess property such as notes, bonds, and stocks, and incorporated companies of the county of Cuyahoga at anything than its true value, did you?

A. No, sir.

Q. 30. Did you know of a rule or a custom based upon what is known as the Whitbeck case, that because the Supreme Court held in that case substantially that because other property in this county was not taxed to exceed 60 per cent., that therefore bank stock should not be taxed above 60 per cent.—that other property outside of banks should be taxed 60 per cent.?

A. I have always studiously avoided using, as auditor any per cent., so that any one could say we were using a per cent.; and if a controversy—if I can say controversy—existed between the board and myself, it was upon the rule of a per cent. I thought they ought to arrive at values without using a percentage, because it led to the making of a custom that ought not to exist.

Q. 31. The custom that is suggested by attorneys for plaintiff in this case as the rule for the taxing officers of Cuyahoga county, that you should determine the true value thereof in money of bonds and stocks, and thereafter just lop off 40 per cent.—was there any such rule as that?

129 A. I never adopted any such rule. The board used different percentages in arriving at different property.

Q. 32. To use an illustration, take a promissory note of $1,000. If that note was by a doubtful party, whose solvency was doubtful, the per cent. might have been very much greater than 40 off?

A. Yes, it might not be more than 10 per cent. of its value.

Q. 33. And if the note was drawing 8 per cent., and secured by a mortgage on good real estate, it would be higher than one that hadn't any security when it came to a test?

A. It ought to be.

Q. 34. If a question was raised on that kind of paper, you took those matters into consideration?

A. Yes, certainly, I always gave instructions to the assessors that they must value credits as they find credits, just as they found horses or cattle or anything else. And while it was a fact that we fixed upon the average horse, it was done so we might know how to tax average stock.

Q. 35. If any other rule grew up, such as a 60 per cent. rule, that was done without your orders and illegal?

A. I think the people themselves have been willing to catch onto such rules and use them, more than the taxing officers have been willing to allow them to be used.

Q. 36. How about money absolutely deposited, money in hand and money in bank. Did you ever formulate a rule that you knew of to tax it at 60 per cent. *at* the coin of the realm?

A. I have given instructions that money was money and should be taxed.

Q. 37. Each year you adopted the par value?

A. That's the instructions I gave, especially to the county assessors. I wasn't aware till very recently that the board ever considered any other basis.

Q. 38. You never gave any instructions to any assessing officer or equalizing officer to go below that rule?

A. Only that a dollar was a dollar.

Q. 39. When you reached other credits in the nature of bonds that depended upon the solvency and the management of a corporation, or notes that depended upon the solvency of the maker, you took all these matters into consideration in fixing its true value in money?

A. Just the same way we would machinery out of a manufacturing plant that was out of date, in comparison with new. One would be higher and the other would be lower.

130 Q. 40. Didn't you in your instructions to the assessors and taxing officers under you cite section 2739 itself, and say that in listing personal property it should be valued at the usual selling price thereof at the time of listing at the place where the same may be?

A. These books were always given to the assessors as part of their instructions.

Q. 41. I will call your attention to the report of the Mercantile national bank, in which their capital stock was one million, their surplus fund $200,000, and their undivided profits $94,254.77, as sworn to by C. L. Murphy, cashier, on the 28th day of July, 1897, before Albert Straus, notary public of Cuyahoga county, and reported to the Comptroller of the Currency as being the condition of their bank at the close of business July 23rd, 1897, and ask you if you had that before you or such a report?

A. We always had report. It might not have been that one, might have been the one made in May or April.

Q. 42. You took the report of the Comptroller of the Currency as near the time as their report made to you as you could?

A. Yes.

Q. 43. Do you remember that this bank made its report to you long after the statutory time?

A. We report everything to the auditor of State July 19th, but the report was made to us prior to that.

Q. 44. You have a stamp mark on that report, showing that a few days before July 12th it was received by you?

A. It was received before that. We stamped them before we sent them to the State officer.

Q. 45. Can you show when they were received by you?

A. Yes. I will furnish the date of the filing of the reports of each of these banks in suit.

Q. 46. Can you furnish the report of the respective banks in suit herein that was made to the Comptroller of the Currency, that you used as data, and have it attached as part of your testimony?

A. Yes, unless I am mistaken the report to the Comptroller of the Currency is cut out and attached to each one of these in our office, and cemented right to it. The only way I could do would be to get the book which has copies of them, and furnish them.

Q. 47. Are you acquainted with Mr. Bates, the witness that testified in the former session today in this matter?

A. Theodore M. Bates. I am quite well acquainted with him.

131 Q. 48. Do you ever come in contact with him in reference to his mode of valuing property, or have any discussions with him?

A. While he was one of the officials I was secretary of the board of three that the law has recently declared unconstitutional. I naturally came in contact with him in that way. I had no official connection farther than as secretary, with the board.

Q. 49. What has been his business since he was out of the board?

A. He is an attorney.

Q. 50. What has been his business in reference to getting taxes reduced or valuations reduced? Has he been appearing before that board for corporations and other vested interests in this city to reduce their valuation for taxation?

To which question plaintiff objected as not being proper cross-examination.

A. He has acted as attorney before the board and before the auditor on tax matters.

Q. 51. For the purpose of reducing or increasing the valuations of taxes?

Same objection by plaintiff.

A. I could not say, only I know he appeared in the interest of certain people in fixing their tax return. He appeared before me for parties that I had summoned in because of their return, through the inquisitor.

Q. 52. What was the difference between you as head of the taxing department in the county and him as a member of the board on the system of valuation, if any in your theory?

A. I worked upon the theory of valuing property without using a per cent., and they insisted upon using a per cent. We differed in that manner of proceeding. I never have used a given per cent. It is true I have known the thing came to a per cent., and a different per cent. for different property.

Q. 53. So, then, there was no rule, but it was a matter of the computation made by yourself on one theory, and they made it on other theories. But they did not take an absolute iron-clad rule in this county to fix all property at 60 per cent. in regard to its true value in money?

A. I know they used 40 per cent. for a class of manufacturing property. They assumed that that was its true value in money.

Whereupon an adjournment was had until 9 a. m., August 17th, 1898.

132 AUGUST 17TH, 1898—9 a. m.

Parties met pursuant to adjournment and resumed the taking of depositions.

Present: W. W. Boynton, counsel; N. T. Horr and E. S. Cook, solicitors for complainants. Frank S. Monnett, attorney general; Smith W. Bennett, assistant attorney general; P. H. Kaiser, solicitor for Cuyahoga county, Ohio, for respondents.

Cross-examination of ALBERT E. AKINS cont.

By Mr. MONNETT:

Q. 54. Did you as county auditor, at the time you fixed the values in question, have before you the returns made by these same banks to the Comptroller of the Currency, and did you use them as an element in determining their value for the purpose of taxation in any way? If so explain fully in the record.

To which question plaintiff objected as irrelevant.

A. The law requires the attaching of one of these comptroller's statements to each return. The heading of the return itself says that. We never have been quite as particular about that heretofore as this present year 1898. We always have one of these books, this Financial Review. This is of May 14th, 1897. We work upon that to see the discrepancies that exist.

Q. 55. You used the returns of these plaintiff banks as made to the Comptroller of the Currency, as one of the evidences of their value.

—. These, of course, are known to be the exact figures of the banks to the Comptroller of the Currency, and we referred to these in each individual case. And this year you will notice we have attached—and I suppose these were attached too instead of left separate—we have these as a guide to know what the difference is between their report and the comptroller's statement.

Q. 56. You have satisfied yourself that the report you have before you is an exact copy of their report?

A. This is, yes (referring to a little pamphlet entitled "Financial Review," under date of Cleveland, June, 1897, and marked for identi-cation "Akin Exhibit B").

Q. 57. Is there a copy there of the affidavit to the return of the Mercantile National Bank of Cleveland, in the data you use?

A. Yes, there is an affidavit here, of the Mercantile national bank made by C. L. Murphy, cashier, before Albert Straus, notary public, under date of May 14th, 1897.

133 Q. 58. Will you state under that report that you say you used at the date of finding these values, what was the amount of capital stock paid in according to that affidavit?

To which question plaintiff objected as being secondary proof.

A. The capital stock is a million, the surplus fund $200,000, and undivided profits $89,413.87.

To which answer plaintiff objected as not being the best evidence.

Q. 59. What did you find the value of those three elements of capital?

A. It is $1,289,000 in round numbers.

Q. 60. What real estate did they have on the tax duplicate to be deducted from that amount?

A. They had the amount of real estate $182,600, and the tax duplicate shows $117,370.

Q. 61. Making the deduction as required under the Ohio statute of the real estate as it appears on the tax duplicate of Cuyahoga county, how much was the balance left, face value to taxation of the Mercantile national bank, deducting the real estate from the face value I mean—taking the real estate from the face value?

A. It would be $1,171,630, after deducting the real estate as standing on the tax duplicate. We didn't use that amount.

Q. 62. If I understand you, the Mercantile national bank returned to the Comptroller of the Currency, on May 14th, 1897, $1,289,000, in round numbers, and they held real estate in the State of Ohio on the tax-value duplicate of $117,370?

A. Yes.

Q. 63. Deducting that they had left face value of assets $1,171,630 for that year?

To which question plaintiff objected.

A. Yes.

To which answer plaintiff objected because witness is repeating what appears in a book, which book is the best evidence of what it contains.

Q. 64. What is the amount that you actually placed upon the tax duplicate, Mr. Auditor? Give the figures.

A. A bank that has real estate is upon the duplicate in two places, and in order to know what the bank is taxed, you have to consider the two. If you mean without real estate or with real estate, the question is different. With the real estate the bank is taxed $636,690.

Q. 65. What was the tax without the real estate?

134 A. $519,320.

Q. 66. What was the per cent. with and without real estate, referring to the per cent. theory inquired of you in your examination-in-chief?

To which question plaintiff objected as not cross-examination.

A. Taking it with real estate, taking the amount assessed on the stock, the stock and real estate both as fixing the shares, $519,320 plus $117,370 makes $636,690. That's just as nearly 50 per cent. of the face value, of the reported value to the Comptroller of the Currency as you can figure.

To which answer plaintiff objected.

Q. 67. You may now give us the second proposition; what was the per cent. placed by your county upon this bank, compared with

its face value returned to the Comptroller of the Currency, with the real estate out, based on the tax-duplicate valuation?

A. It is 46.5 per cent.

To which answer plaintiff objected because witness is founding his percentage on the report to the Comptroller of the Currency in a book.

Q. 68. Will you explain again, Mr. Akins, for the record, what basis you used in making your answer as above, that you determined 50 per cent. in one case and 46½ in the other? Please make clear the process by which you arrive at that, starting in with your data?

Same objection by plaintiff

A. I have taken from the May 14th, 1897, report of the Mercantile national bank to the Comptroller of the Currency, called the Financial Review, sworn to by C. L. Murphy, cashier, and attested by the directors, sworn to before Albert Straus, attested by E. R. Perkins, Truman P. Handy and W. S. Tyler—I find from that statement that the capital stock is one million and the surplus $200,000 and the undivided profits $89,000 in round figures, being a total of $1,289,000 in round numbers.

Q. 69. That includes real estate?

A. Yes, that includes real estate amounting to $117,370, being the taxable values of real estate upon the duplicate. Deducting the real estate leaves $1,171,630. Working out the percentage of return upon this report upon the value we fixed and with the real estate value included in the amount fixed upon shares, we have 50 per cent. very close, it is a little less. But with the real estate out we have 46½ per cent.

Q. 70. Will you take up Mr. Akins, the next plaintiff in the suits at bar, to wit, The National Bank of Commerce, and furnish
135 the court with a similar statement making it as plain as you have just demonstrated the Mercantile national bank return?

Plaintiff objected to this testimony as irrelevant, and as giving the contents of a book purporting to contain returns to the Comptroller of the Currency, and taken in another case. Plaintiff also objected to the testimony taken in that case relating to the taxation of the shares of the National Bank of Commerce.

A. I find in this same Financial Review a report of the National Bank of Commerce under date of May 14th, 1897, being the same report under the same date as the Mercantile national bank just stated.

Q. 71. Is it the statement you had before you when you made this return?

A. Yes, being the same book we had at that time. The capital stock being $1,500,000 the surplus fund $300,000,000, the undivided profits $71,837, which makes a total of $2,071,837. This is sworn to by F. E. Ritman, cashier, before Robert F. Schade, notary public, May 20th, 1897, and attested by William Chisholm, J. H. Wade, and J. H. McBride, directors, as appears by the book. The assessment

fixed by me as auditor with real estate included would be $946,620, being 46 per cent. of the report to the Comptroller of the Currency as stated in this book. Taking the real estate out, or giving the value, $879,130 which is the shares fixed upon the bank with real estate out, it makes 44 per cent. of the face value as appears in this report.

Q. 72. You may take up and give a similar set of figures or data upon which you acted in arriving at the values of The Commercial National Bank, one of the plaintiff banks?

To which question plaintiff objected as not being cross-examination, and as being testimony taken in another case, such testimony not being testimony in common between all the cases within the stipulation made relating thereto by counsel.

A. I find in this same Financial Review a report of the Commercial national bank under date of May 14th, 1897, being the same report under the same date as the Mercantile national bank just stated, being the same book we had before us at that time.

To which answer plaintiff objected.

Q. 73. This report you have referred to of the Commercial national bank was sworn to by whom and attested to by whom according to this report?

To which question plaintiff objected because witness is not undertaking to speak from his own personal knowledge.

136 A. The report shows that the Commercial national bank has a statement under date of May 14th, 1897, sworn to by William P. Johnson, cashier, before P. W. Payne, notary public, under date of May 20th, 1897, attested as correct by F. J. Brown, R. R. Rhodes and J. Colwell, directors. This shows the capital stock to be $1,500,000, surplus fund $500,000, undivided profits $6,700 in round numbers, making a total of $2,006,700. The assessment fixed upon that with the real estate in amounts to $948,140, being 47 per cent. of the statement made in the Financial Review. With the real estate out it is $926,790, that being 45½ per cent. of the statement in their report.

To which answer plaintiff objected as being a recitation of what purports to be contained in a report to the Comptroller of the Currency and recited from a book.

Q. 74. Take up the next one of the plaintiff banks, The Central National Bank of Cleveland, Ohio, and state whether you had before you the same table you have now before you, and if so give the data you gathered therefrom?

To which question plaintiff objected on the ground that it is taking testimony in another case not covered by the stipulation that testimony in common may be used in all cases; and also on the ground that the question asked calls for a recitation from a book before the witness.

A. I find in this same Financial Review a report of the Central National Bank of Cleveland under date of May 14th, 1897, being the same report under the same date as the Mercantile national bank just stated, being the same book we had at that time. In this report the Central national bank has a statement sworn to by J. J. Sullivan, cashier, before Morris Black, notary public, on May 20th, 1897, attested to as correct by John H. Farley, N. C. Brewer and B. I. Pennington, directors, showing the capital stock to be $800,000, surplus fund $135,000, and undivided profits $42,594.33, making a total of $977,594. This bank has no real estate. The amount assessed for taxation is $483,660, being almost exactly 50 per cent. of the amount reported to the Comptroller of the Currency according to this statement.

Plaintiff objected to the above answer on the ground that it is taken from a book.

Q. 75. You have given in this Central national bank report as the total amount of assets as returned by them to the Comptroller of the Currency $977,594, and the real value, or the value assessed by the county was $483,660. What was the amount actually deducted in dollars and cents from their report?

To which question plaintiff objected on the grounds previously stated.

137 A. In figuring these per cents I have not carried them out to a fraction. It makes the balance $493,934, and the amount taxed is $483,660, about $5,000 more than one-half was thrown off.

Plaintiff objected to the answer on the same ground as above stated.

Q. 76. Will you be kind enough to take up the next plaintiff bank and furnish us the data in a similar manner, The National City Bank?

To which question plaintiff objected as being testimony which relates to another case and calls for a recitation in a book entitled Financial Review, which book is the best evidence of what it contains.

A. I find in this same Financial Review a report of the National City bank under date of May 14th, 1897, being the same report under the same date as the Mercantile national bank just stated, being the same book we had at that time. I find there a statement made by the National City Bank of Cleveland, sworn to by E. R. Date, cashier, before Charles Herbert Taylor, notary public, attested to as correct by Horace E. Andrews and T. W. Burnham, as directors, in which it shows the capital stock to be $250,000, surplus fund $150,000, undivided profits $146,483, making a total of $546,483. The assessed value placed upon the bank at the time was $252,830, being 46 per cent. plus, of the face value as reported in this Financial Review. The real estate is so small, only $2,370, it does not make any difference in the per cent., if we are going to treat with round numbers.

Plaintiff objected to this answer on the same ground as previously stated.

Q. 77. How much was there thrown off or discounted between the amount sworn to by their cashier on May 14th, and that fixed by you for tax values?

To which question plaintiff objected on the grounds previously stated.

A. $293,653. I am stating this all from the appearance of the book.

Q. 78. Be kind enough to take up The Western Reserve National Bank, one of the plaintiff banks, and furnish the court with a similar statement?

To which question plaintiff objected as calling for evidence taken in another case, and calling for a recitation of what appears in a book called the Financial Review.

A. I find in this same Financial Review a report of the Western Reserve national bank under date of May 14th, 1897, being the same report under the same date as the Mercantile national
138 bank just stated, being the same book we had before us at that time. It is made by G. S. Russell, cashier, sworn to before W. C. Merrick, notary public, and attested to as correct by David Z. Norton, James H. Hoyt, and Harvey H. Brown, directors. It states in this report that the capital stock was one million dollars, surplus fund $125,000, undivided profits, $17,000, making a total of $1,142,000 in round numbers. The bank had no real estate reported. The amount assessed at the time is $590,280, making 52 per cent. of the amount as shown by the statement in the report we had before us in the Financial Review.

To which answer plaintiff objected on the grounds previously stated.

Q. 79. You may state in dollars how much was the actual discount?

A. The difference would be $551,720.

Q. 80. Will you be kind enough to take up the next plaintiff bank, The First National of Cleveland, and furnish the court with a similar statement?

To which question plaintiff objected as calling for testimony taken in another case and as calling for a statement of what appears in a pamphlet called that Financial Review.

A. I find in this same Financial Review a report of the First National Bank of Cleveland under date of May 14th, 1897, being the same report under the same date as the Mercantile national bank just stated, and being the same book we had before us at that time. This statement is made by Thomas H. Wilson, cashier, sworn to before Alfred Clum, notary public, May 20th, and attested to as correct by J. H. Morley, James Barnett and Stiles C. Smith, as directors, under May 20th, 1897, in which the capital stock is stated $500,000,

surplus fund $100,000, and undivided profits, $8,412, being in round numbers a total of $608,400. The amount returned by me as auditor at the time for taxation is $315,900, being 52 per cent. of the amount as shown in the Financial Review report that I had before me at the time, with real estate in, but with the real estate out, it would be just 50 per cent.

To which answer plaintiff objected on the same grounds as previously stated.

Q. 81. Will you be kind enough to give the actual figures or the difference between the amount returned to the Comptroller of the Currency, and the amount that you assessed the value thereof for taxation of that year?

To which question plaintiff objected on the grounds previously stated.

A. It would be $282,500, deducting the amount taxed from the total would leave that amount untaxed.

139 Plaintiff objected to the answer as being a mere recitation of something that is contained in a book.

Q. 82. Will you be kind enough to take up the next plaintiff bank The Cleveland National Bank?

To which question plaintiff objected, on the ground previously stated.

A. I find in this same Financial Review a report of the Cleveland national bank under date of May 14th, 1897, being the same report under the same date as the Mercantile national bank just stated, being the same book we had before us at that time. The statement is made for the bank by T. W. Hill, cashier, sworn to before J. M. Shallenberger, notary public, May 20th, 1897, and attested to as correct by P. M. Spencer, N. O. Stone, H. Tiedemann, as directors, and showing capital stock $500,000, surplus fund $100,000, and undivided profits $13,300 making a total of $613,340, the amount fixed for taxation at the time with real estate included amounts to $517,611, making a percentage of 51 of the total, leaving a balance of $295,729.

To which answer plaintiff objected on the grounds previously stated.

Q. 83. What was the per cent. with the real estate out?

A. With real estate out it makes a percentage of 44½ of the total.

Same objection by plaintiff.

Q. 84. Will you be kind enough to take up the State national bank in the same way?

To which question plaintiff objected on the ground that it is testimony taken in another case, and calls for a recitation from a book called the Financial Review.

A. I find in this same Financial Review a report of the State national bank under date of May 14th, 1897, being the same report

under the same date as the Mercantile national bank just stated, being the same book we had before us at that time. This report was made by H. R. Sanborn, and sworn to before Edward F. Spurney, notary public, on the 20th of May, 1897, and attested to as correct by S. H. Curtiss, H. D. Coffinberry, H. C. Ellison, as directors, in which it shows that the capital stock amounted to $500,000 surplus fund $100,000, undivided profits $19,400 in round numbers, making a total of $619,400. The bank was assessed at the time with real estate included $300,800 being a per cent. of 48½ with. real estate. With real estate out, which is only $1,100, the amount would be 48 per cent.

To which answer plaintiff objected on the grounds previously stated.

140 Q. 85. What was the actual amount in figures deducted from the face value of their return, as compared with their return to the Comptroller of the Currency, sworn to and certified as you have given?

To which question plaintiff objected on the grounds previously stated.

A. Deducting the taxed amount from the total would be $618,600.

Same objection by plaintiff.

Q. 86. Take up the Union national bank and furnish us a similar statement.

To which question plaintiff objected on the ground previously stated.

A. I find in this same Financial Review a report of the Union national bank under date of May 14th, 1897, being the same report under the same date as the Mercantile national bank just stated, being the same book we had before us at that time. This report was sworn to by E. H. Bourne, cashier, before W. B. Whiting, notary public, May 20th, 1897, and attested by L. McBride, F. A. Sterling, J. C. Weideman, directors, in which it sets forth the capital stock to be one million dollars, surplus fund $200,000 undivided profits $46,900 in round numbers, making a total of $1,246,900. The amount as fixed by me as auditor for the assessment valuation is $627,600, being 50 per cent. plus a slight fraction of the face amount.

Q. 87. State how much in dollars and cents was the amount actually deducted from the face value of their return to the Comptroller of the Currency?

A. $619,300

Q. 88. Take up the next plaintiff bank, The Park National, of Cleveland, Ohio, and furnish us with a similar statement.

To which question plaintiff objected on the ground previously stated.

A. I find in this same Financial Review a report of the Park National Bank, of Cleveland, under date of May 14th, 1897, being the same report under the same date as the Mercantile national bank

just stated, being the same book we had before us at that time. This statement is sworn to by John Sherwin, cashier, May 21, 1897, before Francis W. Treadway, notary public, and attested by H. A. Bishop, M. A. Marks and R. A. Harmon, as directors, in which it sets forth the capital stock to be $500,000, surplus funds $25,000, undivided profits $17,000, making a total of $542,000. The amount fixed by me for taxation at the time was $299,400 or 55 per cent. of the amount shown by the report. There is no real estate in this. The difference is $242,600.

141 Same objection by plaintiff.

Q. 89. Will you be kind enough to take up The Euclid Avenue National Bank, one of the plaintiff banks, and furnish a similar statement for that?

To which question plaintiff objected on the grounds previously stated.

A. I find in this same Financial Review a report of the Euclid Avenue national bank under date of May 14th, 1897, being the same report under the same date as the Mercantile national bank just stated, being the same book we had before us at that time. This report was sworn to by C. E. Farnsworth, cashier before H. H. Johnson, notary public, May 19th, 1897, and attested as correct by Kaufman Hays, Horace Andrews and F. F. Hickox, directors, in which it sets forth the capital stock to be $500,000, surplus fund $150,000 and undivided profits $65,220 in round numbers, making a total of $715,220. The amount fixed for taxation purposes at the time of the assessment was $316,690, being 45 per cent. with the real estate in, of the amount shown in this Financial Review report.

Same objection by plaintiff.

Q. 90. How much was the per cent. with the real estate out?

Same objection by plaintiff, on the grounds previously stated.

A. With the real estate out it would have been 41 per cent.

Q. 91. How much was the amount deducted from the face of their returns that was not reported for taxation?

To which question plaintiff objected on the ground previously stated.

A. $399,530 is the difference.

Same objection by plaintiff.

Q. 92. The tables that you have used, and which have been objected to by counsel for plaintiff, are they the same tables that are reports of the banks that you have testified concerning, which you used at the time you fixed these values as county auditor?

To which question plaintiff objected on the ground previously stated.

A. Yes, this is the same table.

Same objection by plaintiff.

Q. 93. Will you kindly furnish this set of tables of the banks you have just testified to, and make it part of your testimony and mark it Akin's Exhibit B?

To which question plaintiff objected on the grounds previously stated.

142 A. Yes, I herewith hand the same to the stenographer for the purpose of having it attached to my testimony, being page 10 to page 15 both inclusive of the Financial Review published in June, 1897, volume 1, No. 5.

To which plaintiff objected on the grounds previously stated. Said tables are herewith attached and are as follows:

AKIN EXHIBIT B.

*Report of the Condition of the Cleveland National Bank, at Cleveland, in the State of Ohio, at the Close of Business May* 14, 1897.

Resources.

| | | |
|---|---|---|
| Loans and discounts | | $1,554,123 21 |
| Overdrafts, secured and unsecured | | 6,195 96 |
| U. S. bonds to secure circulation | | 50,000 00 |
| Premiums on U. S. bonds | | 5,000 00 |
| Stocks, securities, etc | | 26,200 00 |
| Banking-house, furniture and fixtures | | 4,000 00 |
| Other real estate and mortgages owned | | 19,741 68 |
| Due from national banks (not reserve agents) | | 77,531 38 |
| Due from State banks and bankers | | 32,122 23 |
| Due from approved reserve agents | | 145,096 61 |
| Checks and other cash items | | 5,973 03 |
| Exchanges for clearing-house | | 10,315 73 |
| Notes of other national banks | | 1,230 00 |
| Fractional paper currency, nickels and cents | | 256 51 |
| Lawful money reserve in bank, viz: | | |
| Specie | $45,580 00 | |
| Legal-tender notes | 83,000 00 | |
| | | 128,580 00 |
| Redemption fund with U. S. Treasurer (5 per cent. of circulation) | | 2,250 00 |
| Total | | $2,068,616 34 |

Liabilities.

| | |
|---|---|
| Capital stock paid in | $500,000 00 |
| Surplus fund | 100,000 00 |
| Undivided profits, less expenses and taxes paid | 13,341 78 |
| National bank notes outstanding | 45,000 00 |
| Due to other national banks | 229,208 94 |
| Due to State banks and bankers | 66,275 80 |
| Dividends unpaid | 2,100 00 |

| | | |
|---|---|---|
| | Individual deposits subject to check | 939,176 70 |
| 143 | Demand certificates of deposit | 48,513 12 |
| | Bills payable | 125,000 00 |
| | Total | $2,068,616 34 |

STATE OF OHIO, *County of Cuyahoga*, } ss:

I, T. W. Hill, cashier of the above-named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

T. W. HILL, *Cashier.*

Subscribed and sworn to before me this 20th day of May, 1897.

J. M. SHALLENBERGER,
*Notary Public.*

Correct.
Attest:

P. M. SPENCER,
N. O. STONE,
H. TIEDEMANN, *Directors.*

*Report of the Condition of the Central National Bank, at Cleveland, in the State of Ohio, at the Close of Business May* 14, 1897.

Resources.

| | | |
|---|---|---|
| Loans and discounts | | $2,471,607 43 |
| Overdrafts, secured and unsecured | | 609 42 |
| U. S. bonds to secure circulation | | 100,000 00 |
| Stocks, securities, etc | | 22,000 00 |
| Banking-house, furniture and fixtures | | 10,500 00 |
| Due from national banks (not reserve agents) | | 150,219 67 |
| Due from State banks and bankers | | 17,617 40 |
| Due from approved reserve agents | | 219,628 23 |
| Checks and other cash items | | 12,850 09 |
| Exchanges for clearing-house | | 13,969 87 |
| Notes of other national banks | | 2,450 00 |
| Fractional paper currency, nickels and cents | | 171 08 |
| Lawful money reserve in bank, viz: | | |
| Specie | $92,096 00 | |
| Legal-tender notes | 90,000 00 | |
| | | 182,096 00 |
| Redemption fund with U. S. Treasurer (5 per cent. of circulation) | | 4,500 00 |
| Total | | $3,208,219 19 |

144 Liabilities.

| | |
|---|---|
| Capital stock paid in | $800,000 00 |
| Surplus fund | 135,000 00 |
| Undivided profits, less expenses and taxes paid | 42,594 33 |
| National bank notes outstanding | 90,000 00 |

| | | |
|---|---|---|
| Due to other national banks | | 515,527 38 |
| Due to State banks and bankers | | 253,210 11 |
| Dividends unpaid | | 1,044 00 |
| Individual deposits subject to check | $1,142,711 14 | |
| Demand certificates of deposit | 120,384 00 | |
| Certified checks | 978 97 | |
| Cashier's checks outstanding | 6,769 26 | |
| | | 1,270,843 37 |
| Liabilities other than those above stated, U. S. bond account | | 100,000 00 |
| Total | | $3,208,219 19 |

STATE OF OHIO, *County of Cuyahoga*, } ss:

I, J. J. Sullivan, cashier of the above-named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

J. J. SULLIVAN, *Cashier.*

Subscribed and sworn to before me this 20th day of May, 1897.

MORRIS BLACK,
*Notary Public.*

Correct.
Attest:

JOHN H. FARLEY,
N. C. BREWER,
B. L. PENNINGTON, *Directors.*

*Report of the Condition of the Commercial National Bank, at Cleveland, in the State of Ohio, at the Close of Business May* 14, 1897.

Resources.

| | | | |
|---|---|---|---|
| Loans and discounts | | | $3,294,321 83 |
| Overdrafts, secured and unsecured | | | 1,361 59 |
| U. S. bonds to secure circulation | | | 50,000 00 |
| Due stocks, securities, etc | | | 229,135 63 |
| Banking-house, furniture and fixtures | | | 40,000 00 |
| 145 Other real estate and mortgages owned | | | 8,000 00 |
| Due from national banks (not reserve agents) | | | 176,455 45 |
| Due from State banks and bankers | | | 14,604 85 |
| Due from approved reserve agents | | | 330,805 83 |
| Checks and other cash items | | | 15,419 74 |
| Exchanges for clearing-house | | | 18,785 00 |
| Notes of other national banks | | | 16,455 00 |
| Fractional paper currency, nickels and cents | | | 176 86 |
| Lawful money reserve in bank, viz: | | | |
| Specie | $184,491 | | |
| Legal-tender notes | 60,000 | | |
| | | | 244,491 00 |
| Redemption fund with U. S. Treasurer (5 per cent. of circulation) | | | 2,250 00 |
| Total | | | $4,442,262 78 |

Liabilities.

| | |
|---|---|
| Capital stock paid in | $1,500,000 00 |
| Surplus fund | 500,000 00 |
| Undivided profits, less expenses and taxes paid | 6,702 07 |
| National bank notes outstanding | 45,000 00 |
| Due to other national banks | 309,932 57 |
| Due to State banks and bankers | 164,479 48 |
| Dividends unpaid | 246 00 |
| Individual deposits subject to check | 1,615,902 66 |
| Bills payable | 300,000 00 |
| Total | $4,442,262 78 |

STATE OF OHIO, }
*County of Cuyahoga,* } ss:

I, Wm. P. Johnson, cashier of the above-named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

WILLIAM P. JOHNSON, *Cashier.*

Subscribed and sworn to before me this 20th day of May, 1897.

P. W. PAYNE,
*Notary Public.*

Correct.
Attest:

F. J. BROWN,
R. R. RHODES,
J. COLWELL, *Directors.*

146 *Report of the Condition of the Euclid Avenue National Bank, at Cleveland, in the State of Ohio, at the Close of Business May 14, 1897.*

Resources.

| | |
|---|---|
| Loans and discounts | $2,756,003 78 |
| Overdrafts, secured and unsecured | 3,780 90 |
| U. S. bonds to secure circulation | 125,000 00 |
| Premiums on U. S. bonds | 6,000 00 |
| Stocks, securities, etc | 170,365 53 |
| Other real estate and mortgages owned | 85,000 00 |
| Due from national banks (not reserve agents) | 132,468 23 |
| Due from State banks and bankers | 54,598 63 |
| Due from approved reserve agents | 567,182 89 |
| Checks and other cash items | 9,110 31 |
| Exchanges for clearing-house | 16,166 55 |
| Notes of other national banks | 23,196 00 |
| Fractional paper currency, nickels and cents | 145 03 |

| | | |
|---|---|---|
| Lawful money reserve in bank, viz: | | |
| Specie | $169,000 00 | |
| Legal-tender notes | 150,000 00 | |
| | | 319,000 00 |
| Redemption fund with U. S. Treasurer (5 per cent. of circulation) | | 5,625 00 |
| Total | | $4,273,642 85 |

Liabilities.

| | |
|---|---|
| Capital stock paid in | $500,000 00 |
| Surplus fund | 150,000 00 |
| Undivided profits, less expenses and taxes paid | 65,221 46 |
| National bank notes outstanding | 112,500 00 |
| Due to other national banks | 163,927 25 |
| Due to State banks and bankers | 207,729 91 |
| Dividends unpaid | 420 00 |
| Individual deposits subject to check | 3,004,220 82 |
| Demand certificates of deposit | 2,325 00 |
| Certified checks | 12,955 25 |
| Cashier's checks outstanding | 4,343 16 |
| Liabilities other than those above stated | 50,000 00 |
| Total | $4,273,642 85 |

STATE OF OHIO, } ss:
*County of Cuyahoga,* }

147 I, C. E. Farnsworth, cashier of the above-named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

C. E. FARNSWORTH, *Cashier.*

Subscribed and sworn to before me this 19th day of May, 1897.

H. H. JOHNSON,
*Notary Public.*

Correct.
Attest:

KAUFMAN HAYS,
HORACE ANDREWS,
F. F. HICKOX, *Directors.*

*Report of the Condition of the First National Bank, at Cleveland, in the State of Ohio, at the Close of Business May* 14, 1897.

Resources.

| | |
|---|---|
| Loans and discounts | $1,517,561 48 |
| Overdrafts, secured and unsecured | 605 77 |
| U. S. bonds to secure circulation | 50,000 00 |
| Stocks, securities, etc | 30,891 08 |
| Banking-house, furniture and fixtures | 80,000 00 |
| Other real estate and mortgages owned | 2,064 00 |

| | | |
|---|---|---|
| Due from national banks (not reserve agents) | | 135,732 08 |
| Due from State banks and bankers | | 17,202 62 |
| Due from approved reserve agents | | 156,939 68 |
| Checks and other cash items | | 341 01 |
| Exchanges for clearing-house | | 4,170 25 |
| Notes of other national banks | | 4,419 00 |
| Fractional paper currency, nickels and cents | | 370 62 |
| Lawful money reserve in bank, viz: | | |
| Specie | $87,020 00 | |
| Legal-tender notes | 120,000 00 | |
| | | 207,020 00 |
| Redemption fund with U. S. Treasurer (5 per cent. of circulation) | | 2,250 00 |
| Total | | $2,209,567 59 |

Liabilities.

| | | |
|---|---|---|
| Capital stock paid in | | $500,000 00 |
| Surplus fund | | 100,000 00 |
| Undivided profits, less expenses and taxes paid. | | 8,412 77 |
| 148 National bank notes outstanding | | 41,340 00 |
| Due to other national banks | | 380,336 90 |
| Due to State banks and bankers | | 163,674 33 |
| Dividends unpaid | | 513 00 |
| Individual deposits subject to check | | 945,075 71 |
| Demand certificates of deposit | | 18,196 08 |
| Certified checks | | 1,909 20 |
| Cashier's checks outstanding | | 50,109 60 |
| Bills payable | | 50,000 00 |
| Total | | $2,209,567 59 |

STATE OF OHIO, }
*County of Cuyahoga*, } ss:

I, Thomas H. Wilson, cashier of the above-named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

THOS. H. WILSON, *Cashier.*

Subscribed and sworn to before me this 20th day of May, 1897.

ALFRED CLUM,
*Notary Public.*

Correct.
Attest:

J. H. MORLEY,
JAMES BARNETT,
STILES C. SMITH, *Directors.*

*Report of the Condition of the Mercantile National Bank, at Cleveland, in the State of Ohio, at the Close of Business May* 14, 1897.

Resources.

| | | |
|---|---|---|
| Loans and discounts | | $2,293,588 81 |
| Overdrafts, secured and unsecured | | 1,507 48 |
| U. S. bonds to secure circulation | | 470,000 00 |
| Premiums on U. S. bonds | | 18,000 00 |
| Stocks, securities, etc | | 54,500 00 |
| Banking-house, furniture and fixtures | | 255,000 00 |
| Other real estate and mortgages owned | | 45,000 00 |
| Due from national banks (not reserve agents) | | 91,008 25 |
| Due from State banks and bankers | | 21,980 75 |
| Due from approved reserve agents | | 121,459 21 |
| Checks and other cash items | | 2,494 89 |
| Exchanges for clearing-house | | 8,879 50 |
| 149 Notes of other national banks | | 39,079 00 |
| Fractional paper currency, nickels and cents | | 353 25 |
| Lawful money reserve in bank, viz: | | |
| Specie | $329,350 00 | |
| Legal-tender notes | 65,000 00 | |
| | | 394,350 00 |
| Redemption fund with U. S. Treasurer (5 per cent. of circulation) | | 21,150 00 |
| Total | | $3,838,351 23 |

Liabilities.

| | |
|---|---|
| Capital stock paid in | $1,000,000 00 |
| Surplus fund | 200,000 00 |
| Undivided profits, less expenses and taxes paid | 89,413 87 |
| National bank notes outstanding | 355,900 00 |
| Due to other national banks | 39,410 57 |
| Due to State banks and bankers | 9,195 86 |
| Dividends unpaid | 2,625 00 |
| Individual deposits subject to check | 1,835,709 88 |
| Demand certificates of deposit | 4,802 83 |
| Cashier's checks outstanding | 1,293 22 |
| Liabilities other than those above stated, U. S. bond account | 300,000 00 |
| Total | $3,838,351 23 |

STATE OF OHIO, }
*County of Cuyahoga,* } *ss:*

I, Charles L. Murfey, cashier of the above-named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

C. L. MURFEY, *Cashier.*

Subscribed and sworn to before me this 20th day of May, 1897.

ALBERT STRAUS,
*Notary Public.*

Correct.
Attest:

E. R. PERKINS,
TRUMAN P. HANDY,
W. S. TYLER, *Directors.*

150 *Report of the Condition of the National Bank of Commerce, at Cleveland, in the State of Ohio, at the Close of Business May 14, 1897.*

Resources.

| | | |
|---|---|---|
| Loans and discounts | | $3,524,330 37 |
| Overdrafts, secured and unsecured | | 1,654 28 |
| U. S. bonds to secure circulation | | 190,000 00 |
| U. S. bonds to secure U. S. deposits | | 60,000 00 |
| Premiums on U. S. bonds | | 10,000 00 |
| Stocks, securities, etc | | 255,708 63 |
| Banking-house, furniture and fixtures | | 74,000 00 |
| Other real estate and mortgages owned | | 64,850 59 |
| Due from national banks (not reserve agents) | | 178,708 16 |
| Due from State banks and bankers | | 188,104 61 |
| Due from approved reserve agents | | 329,219 22 |
| Checks and other cash items | | 8,167 82 |
| Exchanges for clearing-house | | 27,266 38 |
| Notes of other national banks | | 23,723 00 |
| Fractional paper currency, nickels and cents | | 30 56 |
| Lawful money reserve in bank, viz: | | |
| Specie | $303,000 00 | |
| Legal-tender notes | 100,000 00 | |
| | | 403,000 00 |
| Redemption fund with U. S. Treasurer (5 per cent. of circulation) | | 8,550 00 |
| Total | | $5,347,313 62 |

Liabilities.

| | |
|---|---|
| Capital stock paid in | $1,500,000 00 |
| Surplus fund | 300,000 00 |
| Undivided profits, less expenses and taxes paid | 71,837 17 |
| National bank notes outstanding | 171,000 00 |
| Due to other national banks | 314,190 92 |
| Due to State banks and bankers | 290,117 20 |
| Individual deposits subject to check | 2,315,062 36 |
| Certified checks | 3,551 95 |
| Cashier's checks outstanding | 18,665 32 |
| United States deposits | 51,517 87 |
| Deposits of U. S. disbursing officers | 11,370 83 |
| Bills payable | 200,000 00 |
| Liabilities other than those above stated | 100,000 00 |
| Total | $5,347,313 62 |

151 STATE OF OHIO, } ss:
*County of Cuyahoga,* }

I, F. E. Rittman, cashier of the above-named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

F. E. RITTMAN, *Cashier.*

Subscribed and sworn to before me this 20th day of May, 1897.

ROBERT F. SCHADE,
*Notary Public.*

Correct.
Attest:

WM. CHISHOLM,
J. H. WADE,
J. H. McBRIDE, *Directors.*

*Report of the Condition of the National City Bank, at Cleveland, in the State of Ohio, at the Close of Business May* 14, 1897.

Resources.

| | | |
|---|---|---|
| Loans and discounts | | $894,652 65 |
| Overdrafts, secured and unsecured | | 6,015 92 |
| U. S. bonds to secure U. S. deposits | | 100,000 00 |
| Stocks, securities, etc | | 10,000 00 |
| Other real estate and mortgages owned | | 2,215 07 |
| Due from national banks (not reserve agents) | | 73,433 57 |
| Due from State banks and bankers | | 17,942 43 |
| Due from approved reserve agents | | 188,203 33 |
| Checks and other cash items | | 2,856 78 |
| Exchanges for clearing-house | | 21,569 68 |
| Notes of other national banks | | 13,583 00 |
| Fractional paper currency, nickels and cents | | 814 71 |
| Lawful money reserve in bank, viz: | | |
| Specie | $88,155 00 | |
| Legal-tender notes | 15,000 00 | |
| | | 103,155 00 |
| Redemption fund with U. S. Treasurer (5 per cent. of circulation) | | 4,500 00 |
| Due from U. S. Treasurer other than 5 per cent. redemption fund | | 3,550 00 |
| Total | | $1,442,492 14 |

152 Liabilities.

| | |
|---|---|
| Capital stock paid in | $250,000 00 |
| Surplus fund | 150,000 00 |
| Undivided profits, less expenses and taxes paid | 146,483 45 |
| National bank notes outstanding | 90,000 00 |
| Due to other national banks | 51,693 26 |
| Due to State banks and bankers | 79,452 23 |
| Dividends unpaid | 654 00 |

| | |
|---|---|
| Individual deposits subject to check | 620,888 78 |
| Cashier's checks outstanding | 1,601 76 |
| United States bond account | 50,000 00 |
| Liabilities other than those above stated | 1,718 66 |
| Total | $1,442,492 14 |

STATE OF OHIO, } ss:
*County of Cuyahoga,* }

I, E. R. Date, cashier of the above-named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

E. R. DATE, *Cashier.*

Subscribed and sworn to before me this 20th day of May, 1897.
CHARLES HERBERT TAYLOR,
*Notary Public.*

Correct.
Attest:
HORACE E. ANDREWS,
T. W. BURNHAM, *Directors.*

*Report of the Condition of the Park National Bank of Cleveland, at Cleveland, in the State of Ohio, at the Close of Business May* 14, 1897.

Resources.

| | | |
|---|---|---|
| Loans and discounts | | $1,402,881 26 |
| Overdrafts, secured and unsecured | | 1,119 64 |
| United States bonds to secure circulation | | 90,000 00 |
| Premiums on United States bonds | | 5,000 00 |
| Banking-house, furniture and fixtures | | 10,000 00 |
| Due from national banks (not reserve agents) | | 121,543 29 |
| Due from State banks and bankers | | 57,939 79 |
| Due from approved reserved agents | | 247,898 84 |
| 153 Checks and other cash items | | 347 65 |
| Exchanges for clearing-house | | 9,272 44 |
| Notes of other national banks | | 8,785 00 |
| Fractional paper currency, nickels and cents | | 100 20 |
| Lawful money reserve in bank, viz: | | |
| Specie | $137,827 75 | |
| Legal-tender notes | 53,475 00 | |
| | | 191,302 75 |
| Redemption fund with U. S. Treasurer (5 per cent. of circulation) | | 4,050 00 |
| Total | | $2,150,240 86 |

Liabilities.

| | |
|---|---|
| Capital stock paid in | $500,000 00 |
| Surplus fund | 25,000 00 |
| Undivided profits, less expenses and taxes paid | 17,081 39 |

| | |
|---|---|
| National bank notes outstanding | 81,000 00 |
| Due to other national banks | 253,770 39 |
| Due to State banks and bankers | 133,355 74 |
| Dividends unpaid | 339 00 |
| Individual deposits subject to check | 1,053,606 49 |
| Demand certificates of deposit | 23,633 68 |
| Certified checks | 12,191 17 |
| Cashier's checks outstanding | 10,263 00 |
| Liabilities other than those above stated, U. S. bond account | 40,000 00 |
| Total | $2,150,240 86 |

STATE OF OHIO, }
*County of Cuyahoga,* } ss:

I, John Sherwin, cashier of the above-named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

JOHN SHERWIN, *Cashier.*

Subscribed and sworn to before me this 21st day of May, 1897.

FRANCIS W. TREADWAY,
*Notary Public.*

Correct.
Attest:

H. A. BISHOP,
M. A. MARKS,
R. A. HARMON, *Directors.*

154 *Report of the Condition of the State National Bank, at Cleveland, in the State of Ohio, at the Close of Business May* 14, 1897.

Resources.

| | |
|---|---|
| Loans and discounts | $2,428,091 57 |
| Overdrafts, secured and unsecured | 259 92 |
| U. S. bonds to secure circulation | 125,000 00 |
| Municipal bonds on hand | 100,000 00 |
| Premiums on municipal bonds | 7,110 00 |
| Premiums on U. S. bonds | 7,300 00 |
| Stocks, securities, etc | 38,500 00 |
| Banking-house, furniture and fixtures | 7,000 00 |
| Other real estate and mortgages owned | 37,432 50 |
| Due from national banks (not reserve agents) | 138,081 93 |
| Due from State banks and bankers | 135,152 18 |
| Due from approved reserve agents | 484,857 22 |
| Checks and other cash items | 13,198 56 |
| Exchanges for clearing-house | 11,854 94 |
| Notes of other national banks | 4,942 00 |
| Fractional paper currency, nickels and cents | 441 34 |

| | | |
|---|---|---|
| Lawful money reserve in bank, viz: | | |
| Specie | $119,675 00 | |
| Legal-tender notes | 250,000 00 | |
| | | 369,675 00 |
| Redemption fund with U. S. Treasurer (5 per cent. of circulation) | | 5,625 00 |
| Total | | $3,914,522 16 |

Liabilities.

| | |
|---|---|
| Capital stock paid in | $500,000 00 |
| Surplus fund | 100,000 00 |
| Undivided profits, less expenses and taxes paid | 19,462 69 |
| National bank notes outstanding | 112,500 00 |
| Due to other national banks | 407,927 10 |
| Due to State banks and bankers | 289,635 29 |
| Dividends unpaid | 603 00 |
| Individual deposits subject to check | 2,363,009 53 |
| Demand certificates of deposits | 26,709 20 |
| Cashier's checks outstanding | 29,675 35 |
| Liabilities other than those above stated, U. S. bond account | 65,000 00 |
| Total | $3,914,522 16 |

155 STATE OF OHIO, }
*County of Cuyahoga,* } ss:

I, Horace R. Sanborn, cashier of the above-named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

H. R. SANBORN, *Cashier.*

Subscribed and sworn to before me this 20th day of May, 1897.

EDWARD F. SPURNEY,
*Notary Public.*

Correct.
Attest:

S. H. CURTISS,
H. D. COFFINBERRY,
H. C. ELLISON, *Directors.*

*Report of the Condition of the Union National Bank, at Cleveland, in the State of Ohio, at the Close of Business May* 14, 1897.

Resources.

| | |
|---|---|
| Loans and discounts | $2,686,527 47 |
| Overdrafts, secured and unsecured | 3,711 14 |
| U. S. bonds to secure circulation | 50,000 00 |
| Stocks, securities, etc | 28,533 33 |
| Due from national banks (not reserve agents) | 394,136 02 |
| Due from State banks and bankers | 101,930 12 |

| | | |
|---|---|---|
| Due from approved reserve agents | | 398,659 49 |
| Checks and other cash items | | 3,088 79 |
| Exchanges for clearing-house | | 37,552 53 |
| Notes of other national banks | | 7,343 00 |
| Fractional paper currency, nickels and cents | | 285 50 |
| Lawful money reserve in bank, viz: | | |
| Specie | $176,257 | |
| Legal-tender notes | 165,000 | |
| | | 281,257 00 |
| Redemption fund with U. S. Treasurer (5 per cent. of circulation) | | 2,250 00 |
| Total | | $3,995,274 39 |

Liabilities.

| | | |
|---|---|---|
| Capital stock paid in | | $1,000,000 00 |
| Surplus fund | | 200,000 00 |
| Undivided profits, less expenses and taxes paid | | 46,982 95 |
| 156 National bank notes outstanding | | 45,000 00 |
| Due to other national banks | | 324,782 92 |
| Due to State banks and bankers | | 422,478 08 |
| Dividends unpaid | | 1,071 00 |
| Individual deposits subject to check | | 1,845,591 40 |
| Demand certificates of deposit | | 88,270 18 |
| Certified checks | | 9,199 76 |
| Cashier's checks outstanding | | 11,898 10 |
| Total | | $3,995,274 39 |

STATE OF OHIO, } ss:
*County of Cuyahoga,* }

I, E. H. Bourne, cashier of the above-named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

E. H. BOURNE, *Cashier.*

Subscribed and sworn to before me this 20th day of May, 1897.

W. B. WHITING,
*Notary Public.*

Correct.
Attest:

L. McBRIDE,
F. A. STERLING,
J. C. WEIDEMAN, *Directors.*

*Report of the Condition of the Western Reserve National Bank, at Cleveland, in the State of Ohio, at the Close of Business May 14, 1897.*

Resources.

| | | | |
|---|---|---|---|
| Loans and discounts | | | $2,248,079 10 |
| Overdrafts, secured and unsecured | | | 1,207 51 |
| U. S. bonds to secure circulation | | | 50,000 00 |
| Stocks, securities, etc | | | 60,438 33 |
| Banking-house, furniture and fixtures | | | 27,000 00 |
| Due from national banks (not reserve agents) | | | 119,300 50 |
| Due from State banks and bankers | | | 62,605 51 |
| Due from approved reserve agents | | | 56,550 82 |
| Checks and other cash items | | | 9,586 55 |
| Exchanges for clearing-house | | | 13,461 17 |
| Notes of other national banks | | | 12,559 00 |
| | Fractional paper currency, nickels and cents | | 592 44 |
| 157 | Lawful money reserve in bank, viz: | | |
| | Specie | $196,110 | |
| | Legal-tender notes | 71,000 | |
| | | | 267,110 00 |
| Redemption fund with U. S. Treasurer (5 per cent. of circulation) | | | 2,250 00 |
| Due from U. S. Treasurer, other than 5 per cent. redemption fund | | | 7,000 00 |
| Total | | | $2,937,740 93 |

Liabilities.

| | |
|---|---|
| Capital stock paid in | $1,000,000 00 |
| Surplus fund | 125,000 00 |
| Undivided profits, less expenses and taxes paid | 17,176 91 |
| National bank notes outstanding | 45,000 00 |
| Due to other national banks | 38,774 34 |
| Due to State banks and bankers | 55,447 41 |
| Dividends unpaid | 714 00 |
| Individual deposits subject to check | 1,503,258 50 |
| Demand certificates of deposit | 27,250 00 |
| Certified checks | 37 00 |
| Cashier's checks outstanding | 82 77 |
| Bills payable | 75,000 00 |
| Liabilities other than those above stated, U. S. bond account | 50,000 00 |
| Total | $2,937,740 93 |

STATE OF OHIO, }
*County of Cuyahoga,* } ss:

I, G. S. Russell, cashier of the above-named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

G. S. RUSSELL, *Cashier.*

Subscribed and sworn to before me this 20th day of May, 1897.
W. C. MERRICK,
*Notary Public.*

Correct.
Attest:
DAVID Z. NORTON,
JAMES H. HOYT,
HARVEY H. BROWN, *Directors.*

158 Q. 94. You may state whether you have any means of ascertaining or determining when the respective plaintiff banks you have testified concerning, filed their report with you as required under the statute, and if so, take them up in the same order and furnish them to the court.

To which question plaintiff objected on the grounds previously stated.

A. The Mercantile national bank reported to our office June 15th, 1897.

Q. 95. Have you the amount that they reported for taxation? If so give the time of filing their report with you and the amounts that they returned.

To which question plaintiff objected on the grounds previously stated.

A. Here is the Mercantile national bank's return, which was received at the auditor's office June 15th, 1897. The anaylsis of this as to what is reported I have carried to the general statement of them all, and it shows that they reported $1,000,000 capital stock, and $174,500 surplus, making a total of $1,174,500, being the amount that we figured upon in arriving at the taxation of the bank.

Q. 96. The total reported for taxation by the Mercantile national bank was $1,174,500, and you actually assessed them at only $636,690. What was the difference between the report made to you of the surplus fund, and that that they had reported to the Comptroller of the Currency?

A. It would be the difference between $174,500 and $200,000, which would be $25,500.

Same objection by plaintiff.

Q. 97. What was the difference reported to you between their undivided profits and the undivided profits as reported to the Comptroller of the Currency May 14th, 1897?

To which question plaintiff objected on the grounds previously stated.

A. They reported no undivided profits. They reported surplus and undivided profits $174,540.

Same objection by plaintiff.

Q. 98. And the total report to the Comptroller of the Currency May 14th on both of these items was how much?

To which question plaintiff objected on the grounds previously stated.

A. $289,413.

Same objection by plaintiff.

Q. 99. Then for the purposes of taxation they had already made reductions before they reported to you?

To which question plaintiff objected on the grounds previously stated.

159 A. Yes.

Same objection by plaintiff.

Q. 100. How much?

Same objection by plaintiff.

A. $114,913. That's on the surplus and undivided profits.

Q. 101. Take up the National Bank of Commerce and give the date of their filing their report with you and the amount, and the amount they were assessed?

To which question plaintiff objected on the grounds previously stated.

A. National Bank of Commerce filed their report June 16th, 1897, sworn to by F. E. Rittman, cashier. The amount reported is $1,500,000 as capital stock. $32,700 were undivided profits and surplus fund, being a total of $1,532,700.

Same objection by plaintiff.

Q. 102. How much had they deducted between what they reported to you for surplus fund and undivided profit, and what they actually reported, as compared with the return to the Comptroller of the Currency a month previous?

To which question plaintiff objected because it appears that the witness does not know what amount the bank returned to the Comptroller of the Currency.

A. The difference between the total capital stock, surplus and undivided profits as reported and as shown by their report for taxation, and as shown in the Financial Review statement would be $339,137.

Same objection by plaintiff.

Q. 103. This same bank deducted $339,137 from their report as reported to the Comptroller of the Currency May 14th, 1897, and the report to you for taxation the same year in June?

To which question plaintiff objected on the grounds previously stated.

A. Yes.

Same objection by plaintiff.

Q. 104. What did you actually place them on the tax duplicate for?

To which question plaintiff objected on the grounds previously stated.

A. $946,620, with real estate included.

Same objection by plaintiff.

Q. 105. How much with real estate excluded?

To which question plaintiff objected on the grounds previously stated.

160 A. $879,130.

Same objection by plaintiff.

Q. 106. Who swore to the respective reports in June and in May, 1897, the one to the comptroller and the other to you?

To which question plaintiff objected on the grounds previously stated.

A. F. E. Rittman swore to the tax return, and the statement in the Financial Review shows the statement sworn to by F. E. Rittman.

Same objection by plaintiff.

Q. 107. The directors did not certify to the correctness of the report to you as county auditor, as they purport to have done in the report to the Comptroller of the Currency?

To which question plaintiff objected on the grounds previously stated.

A. They did not attest, no.

Same objection by plaintiff.

Q. 108. You may take up The Commercial National Bank, one of the plaintiff banks, and state when they filed their report with you as auditor of the county.

To which question plaintiff objected on the grounds previously stated.

A. The Commercial national bank filed its report on June 15th, 1897.

Same objection by plaintiff.

Q. 109. Whom is it sworn to by, and what date?

To which question the plaintiff objected on the grounds previously stated.

A. Sworn to by W. P. Johnson, before P. W. Payne, June 10th, 1897.

Same objection by plaintiff.

Q. 110. What was the amount returned to you for taxation by that report?

To which question plaintiff objected on the grounds ——.

A. Capital stock $1,500,000, surplus fund $66,000.

Same objection by plaintiff.

Q. 111. Any undivided profits?

To which question plaintiff objected on the grounds previously stated.

A. There is no undivided profits.

Same objection by plaintiff.

Q. 112. How much did the same bank on May 14th return to the Comptroller of the Currency of surplus and undivided profits?

To which question plaintiff objected on the ground that the witness knows nothing about the returns.

161 A. The report of the Financial Review states that it was $2,006,700 as the total of the capital stock.

Same objection by plaintiff.

Q. 113. What did they report to you as the surplus, capital stock and undivided profits?

Same objection by plaintiff.

A. $1,566,000 in round numbers.

Same objection by plaintiff.

Q. 114. What was the deduction that they made before returning to you for taxation, compared with the return to the Comptroller of the Currency?

To which question plaintiff objected on the grounds previously stated.

A. $440,700.

Same objection by plaintiff.

Q. 115. After they made that deduction voluntarily before returning to you, the $440,700, did you take off an additional per cent., and how much did it leave?

To which question plaintiff objected on the grounds previously stated.

A. We valued it at $948,140 for taxation.

Same objection by plaintiff.

Q. 116. Making an additional discount below what they returned of how much?

To which question plaintiff objected on the grounds previously stated.

A. $948,140 with real estate included.

Same objection by plaintiff.

Q. 117. They deducted $440,700 from their report to the Comptroller of the Currency, and how much additional did you deduct before placing it on the tax duplicate?

To which question plaintiff objected on the grounds previously stated, and on the further ground that the question has already been answered.

A. The difference would be $617,860.

Same objection by plaintiff.

Q. 118. You deducted $617,860, and they deducted $440,700, leaving the actual amount returned for taxation as finally determined how much?

To which question plaintiff objected on the grounds previously stated.

A. $948,140.

Same objection by plaintiff.

Q. 119. Take up the Central National Bank, the next plaintiff bank, and give the date of their report, who made the report, and the amount.

162 To which question the plaintiff objected on the grounds previously stated.

A. The Central national bank's report was filed June 15th, 1897, sworn to by the cashier, J. J. Sullivan, June 12th, 1897, before Morris Black.

Same objection by plaintiff.

Q. 120. What did they return to you for taxation in capital stock, surplus funds, and undivided profits?

To which question plaintiff objected on the grounds previously stated.

A. The capital stock was returned at $800,000. There is no surplus. Undivided profits was $16,600.

Same objection by plaintiff.

Q. 121. What is the total amount returned to you for taxation?

To which question plaintiff objected on the grounds previously stated.

A. $816,600.

Same objection by plaintiff.

Q. 122. What is the total amount they returned to the Comptroller of the Currency May 14th, 1897, of the same three items?

To which question plaintiff objected on the ground that it does not appear that the witness knows.

A. The statement in the Financial Review of May 20th, 1897, purporting to be sworn to by J. J. Sullivan, cashier, before Morris

Black, notary public, shows the capital stock, surplus fund and undivided profits to be $977,590.

Same objection by plaintiff.

Q. 123. How much in figures was the amount that the bank deducted between that report and what they reported to you for taxation?

To which question plaintiff objected on the grounds previously stated.

A. It was in round numbers $161,000.

Same objection by plaintiff.

Q. 124. After they took off the $161,000 how much additional was taken off by the auditor before it was finally returned for taxation?

To which question plaintiff objected on the grounds previously stated.

A. $483,660 is the amount fixed as the basis for taxation, making a difference between the amount reported and the amount fixed of $332,940.

Same objection by plaintiff.

Q. 125. In addition to their reduction, a reduction of $161,000?

163 To which question plaintiff objected on the grounds previously stated.

A. Yes.

Same objection by plaintiff.

Q. 126. Take up the National City bank next and give the date of their return to you as auditor for the purpose of taxation, and by whom the return is made, and when sworn to?

To which question the plaintiff objected on the grounds previously stated.

A. The National City bank's report was received at our office May 27th, 1897, sworn to by E. R. Date, cashier, before E. C. Forbes, notary public, on the 27th day of May. That return shows capital stock $250,000, surplus fund $150,000, undivided profits $19,800 in round numbers, being a total of $419,800.

Same objection by plaintiff.

Q. 127. What did they return under those three items to the Comptroller of the Currency as shown by the Financial Review and purporting to be sworn to by E. R. Date, under date of May 20th, 1897?

To which question plaintiff objected on the grounds previously stated.

A. It would be $546,483, as shown by the difference.

Q. 128. How much did they deduct in returning to you for the purposes of taxation, as compared with what they reported to the Comptroller of the Currency a few days before?

To which question plaintiff objected on the grounds previously stated.

A. The difference is $126,600 in round numbers.

Same objection by plaintiff.

Q. 129. How much did you put them on the tax duplicate for in Cuyahoga county that year?

To which question plaintiff objected on the grounds previously stated.

A. $252,830, real estate included.

Same objection by plaintiff.

Q. 130. Will you give in figures how much you deducted in dollars from the amount they returned to you for taxation?

To which question plaintiff objected on the grounds previously stated.

A. The difference would be $166,900 in round numbers.

Same objection by plaintiff.

Q. 131. How much did they deduct before reporting to you?

164 To which question plaintiff objected on the grounds previously stated.

A. $126,600 in round numbers.

Same objection by plaintiff.

Q. 132. Will you take up the next bank, The Western Reserve National Bank, one of the plaintiff banks, and give the date of their report to you, who made the affidavit, and the amount of capital stock, surplus and undivided profits?

To which question plaintiff objected on the grounds previously stated.

A. The report of the Western Reserve national bank, June 3rd, 1897, is sworn to by G. S. Russell, cashier before W. C. Merrick, notary public, June 2nd, 1897.

Same objection by plaintiff.

Q. 133. How much did that bank report to you for taxation under the items of capital stock, surplus fund and undivided profits?

To which question plaintiff objected on the grounds previously stated.

A. $1,000,000 capital stock, $1,800 in round numbers for surplus fund. That $1,800 is bracketed for surplus and undivided profits both, being a total of $1,001,800.

Same objection by plaintiff.

Q. 134. What was the amount the same cashier reported to the Comptroller of the Currency under the date of May 20th, 1897, according to the Financial Review report?

To which question plaintiff objected on the grounds previously stated.

A. That says $1,142,000 in round numbers.

Same objection by plaintiff.

Q. 135. How much did this bank deduct from their report to the Comptroller of the Currency as compared with the amount they returned to you for taxation?

To which question plaintiff objected on the grounds previously stated.

A. It would be the difference between $1,142,000 and $1,001,800.

Same objection by plaintiff.

Q. 136. Give the amount you deducted in addition to what they deducted.

To which question plaintiff objected on the grounds previously stated.

A. We fixed the valuation for taxation at $590,280,000, the difference between that and the amount reported to us being $411,520.

165 Same objection by plaintiff.

Q. 137. You deducted $411,520, and they deducted $140,200, or a total deduction from the face of their returns was made of how much?

To which question plaintiff objected on the grounds previously stated.

A. $551,720.

Same objection by plaintiff.

Q. 138. Next is the First national bank. Will you take that up and give the date of the filing of their report?

To which question plaintiff objected on the grounds previously stated.

A. It was filed May 21, 1897, sworn to by Thomas H. Wilson, cashier, before Alfred Clum, notary public, on the 21st day of May, 1897. The report shows capital stock $500,000, and surplus fund $5,500 in round numbers, being a total of $505,500. The valuation for taxation fixed upon that is $315,900.

Same objection by plaintiff.

Q. 139. Please examine the First national bank's return to the Comptroller of the Currency and give the date of the return before the same notary.

To which question plaintiff objected on the grounds previously stated.

A. The statement in the Financial Review would indicate $608,412, in capital stock, surplus and undivided profit.

Same objection by plaintiff.

Q. 140. Who swore to that and what date?

To which question plaintiff objected.

A. Thomas H. Wilson, cashier, before Alfred Clum, notary, May 20, 1897.

Same objection by plaintiff.

Q. 141. Sworn to the day before they swore to the report that they filed with you?

Same objection by plaintiff.

A. Yes.

Same objection by plaintiff.

Q. 142. How much did the cashier in his two reports deduct before returning to you for taxation?

To which question plaintiff objected on the grounds previously stated.

A. $102,900.

Same objection by plaintiff.

Q. 143. This same cashier, in making the two reports—one to you as auditor, and one to the Comptroller of the Currency—made a difference of $102,900 within one day?

166 To which question plaintiff objected on the grounds previously stated.

A. Yes.

Same objection.

Q. 144. How much in addition to that did you deduct from their report?

To which question plaintiff objected on the grounds previously stated.

A. $189,600.

Same objection by plaintiff.

Q. 145. After they deducted $102,900, you deducted in addition $189,600?

To which question plaintiff objected on the grounds previously stated.

A. Yes.

Same objection.

Q. 146. The Cleveland national bank is next, will you give the date of their report to you, who made the report and the amount reported?

To which question plaintiff objected on the grounds previously stated.

A. The Cleveland national bank was reported on June 15th, 1897, sworn to by T. W. Hill before R. C. Wright, notary public, on the 11th day of June, 1897. The amount reported is $500,000 capital stock. No surplus or undivided profits.

Same objection by plaintiff.

Q. 147. How much did the same cashier, T. W. Hill, report for capital stock, surplus fund and undivided profits to the Comptroller of the Currency as shown by the Financial Review?

To which question plaintiff objected on the grounds previously stated.

A. The statement in the Financial Review would indicate $613,340 in round numbers.

Same objection by plaintiff.

Q. 148. How much did the same cashier deduct from the amount returned to the Comptroller of the Currency as compared with the amount returned to you?

To which question plaintiff objected on the grounds previously stated.

A. $113,340.

Same objection.

Q. 149. How much did you then deduct in addition to that before putting it on the tax duplicate for that year?

To which question plaintiff objected on the grounds previously stated.

167 A. The amount fixed for taxation is $317,611, the difference is $192,389.

Same objection.

Q. 150. Take up the State national bank and give the date they filed their report with you and the amount they returned to you for the purpose of taxation.

To which question plaintiff objected on the grounds previously stated.

A. The State national bank filed its report June 15th, 1893, sworn to by H. R. Sanborn, cashier, before Edward F. Spurney, notary public, May 8th, 1897; capital stock in the report shows $500,000, undivided profits, $27,000 in round numbers. No surplus fund. The total reported for taxation is $527,000.

Same objection by plaintiff.

Q. 151. Will you give the amount that that same cashier returned to the Comptroller of the Currency on those same three items under date of May 20, 1897?

To which question plaintiff objected on the grounds previously stated.

A. This would indicate, in this statement of the Financial Review $500,000 capital stock, $100,000 surplus fund, and $19,462 undivided profits, being a total of $619,462, capital stock, surplus, and undivided profits, as shown in the Financial Review.

Same objection by plaintiff.

Q. 152. How much did they voluntarily deduct from the two reports taking the one as returned to the Comptroller of the Currency and the one returned to you for taxation?

To which question plaintiff objected on the grounds previously stated.

A. The difference is $92,462.

Same objection by plaintiff.

Q. 153. Will you give the amount assessed upon, or the amount you actually placed on the duplicate for that year?

To which question plaintiff objected on the grounds previously stated.

A. $300,800.

Same objection by plaintiff.

Q. 154. How much did you deduct from their returns, or how much did that leave?

To which question plaintiff objected on the grounds previously stated.

A. 226,200.

Same objection.

168 Q. 155. That is, they first deducted $92,462 before reporting to you, and you took off $226,200, and there was a total deduction of $318,662?

To which question plaintiff objected on the grounds previously stated.

A. Yes.

Same objection by plaintiff.

Q. 156. Please take up the Union national bank and give the date when they filed their report and who filed it, and the amount?

To which question plaintiff objected on the grounds previously stated.

A. The Union national bank filed their report May 21, 1897,

sworn to by E. H. Bourne, cashier, before R. C. Wright, notary public, May 21, 1897.

Same objection by plaintiff.

Q. 157. Give the figures.

To which question plaintiff objected on the grounds previously stated.

A. It shows capital stock $1,000,000, surplus fund and undivided profits, bracketed together, $46,044, making a total of $1,046,000 in round numbers.

Same objection by plaintiff.

Q. 158. How much did they report by the same cashier as sworn to under date of May 20, 1897—one day before?

To which question plaintiff objected on the grounds previously stated.

A. The statement in the Financial Review would indicate $1,246,982 capital stock, surplus and undivided profits.

Same objection by plaintiff.

Q. 159. How much did they deduct from their face value as returned to the Comptroller of the Currency the day before, as compared with what they returned to you for taxation the day afterward?

To which question plaintiff objected on the grounds previously stated.

A. The difference is $96,176. They returned $1,046,982. I put $627,600 on the duplicate.

Same objection by plaintiff.

Q. 160. How much did they voluntarily deduct from their report to the Comptroller of the Currency as compared with the report they made to you as auditor at the same time?

To which question plaintiff objected on the grounds previously stated.

A. $200,982.

169 Same objection by plaintiff.

Q. 161. In addition to that how much did you deduct?

To which question plaintiff objected on the grounds previously stated.

A. $418,400; total deduction $619,382.

Same objection by plaintiff.

Q. 162. The Park national bank is next. You may give the date of their return to you for taxation.

To which question plaintiff objected on the grounds previously stated.

A. That was reported May 18, 1897, sworn to by John Sherwin, cashier, before William H. Marlatt, May 18, 1897.

Same objection by plaintiff.

Q. 163. The directors did not attest to that report?

To which question plaintiff objected on the grounds previously stated.

A. No, they did not.

Same objection by plaintiff.

Q. 164. Please give the amount that that bank at that time reported?

To which question plaintiff objected on the grounds previously stated.

A. $500,000 capital stock and $9,325 as surplus fund and undivided profits, making a total in round numbers of $509,000, for taxation.

Same objection by plaintiff.

Q. 165. How much did they return three days later to the Comptroller of the Currency, May 20, 1897?

To which question plaintiff objected on the ground that the information sought therein is not within the knowledge of the witness.

A. In this report of the Financial Review it would indicate that their capital stock was $500,000, surplus $25,000 and undivided profits $17,000 or a total of $542,000 in round numbers, or a difference of $33,000 in the statement in the Review and their report for taxation.

Same objection by plaintiff.

Q. 166. How much did they deduct before returning to you?

To which question plaintiff objected on the grounds previously stated.

A. $33,000.

Same objection.

Q. 167. How much did you deduct in addition to what they deducted before you put it on the tax duplicate?

To which question plaintiff objected on the grounds previously stated.

170 A. The amount returned for taxation is $299,400. I deducted $209,600 from their report.

Same objection by plaintiff.

Q. 168. What was the amount in figures you put them on the duplicate at?

To which question plaintiff objected on the grounds previously stated.

A. $299,400.

Same objection.

Q. 169. Take up the Euclid Avenue national bank, please, and give us the date of the filing of their report with you, and the amount?

To which question plaintiff objected on the grounds previously stated.

A. The statement of the Euclid Avenue national bank was filed June 3, 1897, sworn to by C. E. Farnsworth, cashier, before C. J. Gould, notary public, on the second day of June, 1897. The report shows the capital stock to be $500,000, surplus fund $5,000, total $505,000, reported for taxation. The amount listed for taxation is $316,690.

Same objection by plaintiff.

Q. 170. How much had this bank deducted of its own accord from the report to the Comptroller of the Currency, before reporting to you for taxation?

To which question plaintiff objected on the grounds previously stated.

A. The Financial Review statement of May 14, 1897, indicates capital stock $500,000, surplus fund $150,000, and undivided profits $65,221, total $715,220, being a difference of $210,220.

Same objection by plaintiff.

Q. 171. This bank deducted $210,220?

To which question plaintiff objected on the grounds previously stated.

A. Yes.

Same objection by plaintiff.

Q. 172. How much did you deduct from that in dollars and cents?

To which question plaintiff objected on the grounds previously stated.

A. The difference between $505,000 and $316,690 would be $188,310.

Same objection by plaintiff.

Q. 173. Could you summarize that without too much trouble, and make a statement how much the twelve national banks returned to the Comptroller of the Currency in those three items, and how much they voluntarily deducted in the month of May?

171 To which question plaintiff objected as undertaking to give testimony in each particular case of what was done by the Comptroller of the Currency in the others.

A. Taking the amounts from the banks as reported in the Financial Review the total would be $12,272,000 in round numbers. The amount fixed for taxation is $6,036,220.

Same objection by plaintiff.

Q. 174. What per cent. would that make of the entire twelve banks? What would it average on the amount actually placed on the face of the duplicate in 1897 as compared with the amount that they returned and swore to the Comptroller of the Currency in May, 1897?

To which question plaintiff objected as grouping all the banks together and holding each responsible for the actions of the others.

A. The percentage would be 50 minus, or 49 plus. That is, the amount returned for taxation would be 50 per cent. of the amount reported to the Comptroller of the Currency—not returned for taxation but fixed for taxation.

Same objection by plaintiff.

Q. 175. Take the amount that was actually deducted, the $6,000,000, and then the amount deducted by your board and the amount voluntarily deducted by them, and it amounts to $6,235,780?

To which question plaintiff objected on the grounds previously stated.

A. The amount placed upon the duplicate for taxation, and the amount reported to the Comptroller of the Currency—the difference is $6,235,780.

Same objection by plaintiff.

Q. 176. This $6,235,780 is obtained by what they have voluntarily reduced or deducted from their returns to you, and what you have subsequently deducted?

To which question plaintiff objected on the grounds previously stated.

A. Yes, through the two combined deductions.

Same objection by plaintiff.

Q. 177. The total amount returned for taxation is $6,036,220, and the amount deducted is $6,235,780.

To which question plaintiff objected on the grounds previously stated.

A. That's right.

Same objection by plaintiff.

Q. 178. Or the amount actually returned for taxation being less than 59 per cent.?

172 To which question plaintiff objected on the grounds previously stated.

A. 49 plus or 50 minus.

Same objection by plaintiff.

Q. 179. How much would that amount to in actual dollars in tax for the year, the $6,235,780?

To which question plaintiff objected as irrelevant, and as grouping the question, giving it in relation to all the banks instead of confining it to one.

A. The taxes upon the reduction made by the auditor and the banks themselves, from the report made to the Comptroller of the Currency as shown in this Financial Review, being a total value of $6,235,780 at the rate of $293, which was the rate for the year 1897, the total amount of tax upon that would be $182,709 in round numbers.

Same objection by plaintiff.

Q. 180. That is, if the national banks of this city, the twelve in suit, have returned to the Comptroller of the Currency their stock, surplus and undivided profits, at its true value in money, then they have been discriminated in favor by this system of deduction in the sum you have given, $182,709. If they reported that at the true value in money according to the statute, then they have been exempted to that amount?

To which question plaintiff objected on the grounds previously stated and especially to the language "discriminated in favor."

A. If the amounts reported in the Financial Review to the Comptroller of the Currency are the true value in money of their surplus and undivided profits and capital stock, then the amount fixed for taxation is $182,709 less than the tax upon the true value of money.

Same objection by plaintiff.

Q. 181. And the statute, No. 2337 of Ohio requires that the bank itself list its personal property at its true value in money, does it not?

To which question plaintiff objected.

A. I think it does. The question is, what is the true value in money. The bank uses the word "return" instead of "list."

To which answer plaintiff objected.

Q. 182. What did you require of these plaintiff banks to return to you under your duties as county auditor?

To which question plaintiff objected because the statute provides.

A. I furnished them a blank requiring them to make a return to my office on or before the second Monday in May of each
173 year, and report in duplicate under oath, exhibiting in detail the resources and liabilities of the bank at the close of busi-

ness on the first Wednesday after the first Monday in May preceding such report, together with a full statement of the names and residences of the stockholders, with the number of shares held by each and the par value of each share, as well as a copy of the report to the Comptroller of the Currency made next prior to the second Monday in May of the year in question, to accompany the return for taxation.

Q. 183. Did you give such a blank to each of the twelve plaintiff banks in question in the year 1897?

A. I did.

Q. 184. Did they comply with your request in that particular?

To which question plaintiff objected on the ground that the record shows what their action was.

A. I furnished all the banks early in May these forms furnished me, although I did not give the exact date.

Q. 185. In that part of the instruction requesting them to accompany their return with the report of the Comptroller of the Currency made next prior to the second Monday of May, 1897, or of that year, did they give you a report known as the Financial Review, or did they ratify it or approve of it as being a correct report in your dealings with the fixing of values, being the same one you have stated in your deposition and made "Akin Exhibit B" of this record?

To which question plaintiff objected as leading, and as grouping banks together for a general answer.

A. I don't remember now whether a statement made to the Comptroller of the Currency was with this at the time they came to our office or not. I supposed when I sent for them yesterday, I would find attached to each the report that was furnished us. It is possible we failed to attach, and then for convenience sake used the book that had the same identical reports that they furnished us, if they did furnish them. This year I find the report attached to each that was furnished which I was more careful to exact.

Q. 186. Under section 5211 of the Revised Statutes of the United States referring to this report to the Comptroller of the Currency, where it states that there are not less than five reports during each year to be made, verified by the oath of the president or cashier and attested by the signature of at least three of the directors, and which is required to be printed in a newspaper of general circulation in the place where the bank is situated—that would be in one of your Cleveland papers would it not?

A. Yes.

174 Q. 187. As I understand you, instead of taking the clipping from the Cleveland paper of each of the plaintiff banks you have an exact copy published in book form, which you have made "Akin Exhibit B" for convenience?

A. That's right. I secured this from the Financial Review, No. 409 Perry Payne building. They are sent to my office. Then I assured myself it was the same.

Q. 188. You took the official publication as required under section

5211 R. S. U. S., requiring it to be published in one of the papers in Cleveland and compared it, and found it the same as the Financial Review publication from which you have testified?

To which question plaintiff objected.

A. Yes, I think you will find the copy of the report sent to the auditor of State board—you will find this attached to them. This year we attached to both.

Q. 189. You may state what you did with the copy of the official report taken from one of the Cleveland papers?

To which question plaintiff objected as immaterial.

A. I took from the Cleveland paper the report of the bank of the same date that it showed in the Financial Review, and attached that to the report kept by us and sent the Financial Review to the State auditor for his convenience. I sent the Review with the bank reports, and kept the clipping *him*self and the return.

Q. 190. When you examined the dates and amounts of the official return and in the Financial Review, you found them the same?

A. Yes, or we would not have used it. I verified them. I always do that. That's a precaution the office takes.

Q. 191. The Financial Review that you have made "Akin Exhibit B" is an exact copy of the one you sent to the State auditor?

To which question plaintiff objected as leading.

A. Yes, the Financial Review is an exact copy of the clipping of the papers we attached to the State auditor's paper, if that's the way we did it in 1897. This year we sent the book, certifying it as the same as the clippings we have in our office.

Q. 192. In your instructions to the plaintiff banks you have given generally, to which counsel has objected, was that the same instruction given to each bank?

A. Yes. The instructions are printed upon the forms that each bank had mailed to them, and that they reported upon. They are the same instructions.

Q. 193. And they returned on those instructions?

A. Yes, they returned on those instructions.

Q. 194. The figures you have given in your foregoing testimony are taken from blanks filled out, signed and sworn to by
175 the officers of the respective banks and on the blanks you sent?

A. Yes, that's right.

Q. 195. And in that instruction you asked for a detailed report of the resources and liabilities of the bank at the close of business on the first Wednesday after the first Monday of May preceding such report?

A. That's right.

Q. 196. So that when you have testified to the different dates in which these reports were filed, and the different dates in which they are purported to have been sworn to, the statement so sworn

to and so filed was and is of the condition of the bank at the close of business on the first Wednesday after the first Monday in May?

A. We used these as being the nearest report that came to it, May 14th, 1897.

Q. 197. The report as sworn to on May 20th to the Comptroller of the Currency was the nearest official report corresponding to the report given you as auditor?

A. Yes.

Q. 198. And these are the reports you have been testifying from in your preceding answers herein?

A. Yes, that's right.

Q. 199. Are those the copies or exact statements that the banks themselves furnished to you in compliance with your instructions as being their report to the Comptroller of the Currency to the best of your belief?

A. Yes, they are the ones. The clippings of the papers that was furnished to us in every instance were the same as in this book, otherwise we would not have used this book.

Q. 200. And the banks that were ordered to furnish you such official public reports assented at the time, or did they not, to the use of that same table you testified to, or weren't they before you at all?

A. I ought to explain possibly a thing that has not come out. In every case where I notice a discrepancy have seen that somebody answered for the cashier in some a-tion, I call the bank's attention to it and they appear before me and I affix, after having a conversation with the bank, that value for taxation, based upon the facts as presented to me orally. And that I this year corrected by having a statement in writing from the banks, that I have now turned over to the State auditor to explain these discrepancies between the two.

Q. 201. You have no record of any such testimony of 1897?

A. No.

176 Q. 202. You can't give the name of a witness in each of these plaintiff banks?

A. We called the cashier in every instance. It may have been that somebody answered for the cashier in some instances, but the cashier was the man we got after. My duties over there are quite considerable, and I have to take care of the detail of every department. Mr. Jones being a bank man, he went through this.

Q. 203. What Jones is that?

A. My deputy. He was a bank man at one time, and I let him go through and work out this detail and find out the discrepancies. I was always present.

Q. 204. He is a stockholder in one of these plaintiff banks himself?

A. I cannot say, I presume so.

Q. 205. What bank was he connected with?

A. He was at one time receiving teller or paying teller of the National Bank of Commerce.

Q. 206. In the report of 1897 in which you report the stockholders

and the amount of stock, you have O. L. Jones, 75 shares in the National Bank of Commerce. Is that your deputy?

A. I presume it is. I know of no other O. L. Jones.

Q. 207. Does he own stock in any of the other plaintiff banks?

A. He was one of two heirs, I presume probably in the bank's property came to him. I consider him one of the most honorable men you can find.

Whereupon further hearing of depositions was adjourned until 1.30 p. m., this day, August 17th, 1898.

AUGUST 17TH, 1898—1.30 p. m.

Parties met pursuant to adjournment and resumed the taking of depositions.

Present: W. W. Boynton, counsel; N. T. Horr and E. S. Cook, solicitors for complainants. Frank S. Monnett, attorney general, Smith W. Bennett, assistant attorney general; P. H. Kaiser, solicitor for Cuyahoga county, Ohio, for respondents.

Testimony of ALBERT E. AKINS resumed.

Redirect examination.

By Judge BOYNTON:

Q. 208. The statement you made in your cross-examination,
177 relating to the reports made by the various national banks of the city to the Comptroller of the Currency, were taken from "Akin Exhibit B," which is contained in the Financial Review?

A. Yes.

Q. 209. And they were wholly obtained from that?

A. Today, you mean?

Q. 210. Yes.

A. Yes.

Q. 211. Do you not know that in reporting to the Comptroller of the Currency the banks include all assets standing or appearing on their books, without reference to whether they are good or bad?

To which question defendant objected on the ground that the statute provides what they shall report, regardless of the opinion of the witness.

A. I know they make a report, and of course I do know that some are good and some are bad. I don't know the requirements of the Comptroller of the Currency however.

Q. 212. I am not dealing with the statute or with its requirements, but in making the statement to the Comptroller of the Currency, it is quite natural that the banks should wish to have as good a showing as they reasonably can. And do you not know, therefore, that in making the report of their assets to the Comptroller of the Currency, they put in what appears on their books to be assets, without reference to whether the maker of this or that obligation is solvent or not?

A. I would not know that from actual knowledge of their affairs

or the requirements. I know it appears to be so from the reports and from what I know of taxation.

Q. 213. Do you know what proportion or percentage of the assets of the plaintiff bank, The Mercantile National Bank, were worthless or of little value in the year 1897?

A. We inquired into it, knowing that there was a discrepancy between their bank return for taxation and the statement made to the comptroller. We inquired into it in every case.

Q. 214. What did you ascertain?

A. From their statements made to me verbally, I felt disposed to draw the conclusion which I did for taxation.

To which answer defendant objected as incompetent, irrelevant and hearsay, and as drawing a conclusion; and moved the court to order the same stricken from the record.

Q. 215. Did the cashier of the Mercanile national bank with whom you conversed about the Comptroller of the Currency in the year 1897, inform you that among the assets of the Mercantile national bank reported to the Comptroller of the Currency some were uncollectible?

178 To which question defendant objected as being hearsay evidence requiring an admission in plaintiff's favor.

A. They made that statement to us, or the return would have been otherwise than it was. I might say the amount fixed for taxation would have been otherwise, if the statement had not been made.

Q. 216. I see that in fixing the valuation of the shares of the Mercantile national bank, and the other national banks in the city of Cleveland by you for the year 1897, that in all instances you deducted 60 per cent. of the reported capital, surplus and undivided profits exclusive of real estate. Explain how you happened to do that.

A. I don't think it's exactly 60 per cent. It's close to that. Some are above and some are below.

Q. 217. How did you happen to land about the figure "60" in fixing your percentage?

A. One main reason was that the three years before it had been to about that notch.

Q. 218. You mean for the county of Cuyahoga?

A. Yes, and I think it had been inserted on the blank of the year before, and the State board approved it, and I thought anything the State board approved I would do next year.

Q. 219. What do you mean to say the State board did in the year 1896, with reference to fixing the value of bank shares at 60 per cent. of their capital, surplus and undivided profits?

To which question defendant objected because it pertains to a time not embraced within the period for which reduction are now sought.

A. In all matters of taxation the habits of doing one year leads

to doing another. The custom in the manner of taxing banks or any other property one year would lead with the same property another year. For instance, if one kind of property was taxed about a given per cent. of its face value, and another came in next year, it would be the rule largely. I had been out three years and all these matters were matters recalling what we had done, and we went back over the years before to see what had been done and especially the year before, to see what the State board had approved especially in banks and railroads, and thinking that they had been dealt with justly, all we wanted to do was to deal justly in the future, and so we acted somewhat upon what had been done the year before.

Defendant objected to the answer.

Q. 220. And the year before was the year 1896?

A. Yes.

179 Q. 221. What did you state a short time ago in regard to noting on your return to this State board of equalization for bank shares 60 per cent. as the value fixed?

A. I didn't say I noted. I noticed it had been noted the year prior to 1897.

Q. 222. Who noted it?

A. My predecessor, indicating here where it says "leaving taxable valuation of shares at — dollars," he wrote in "60 per cent." in large figures, and the amount that was here was 60 per cent.

Q. 223. And the amount carried out was 60 per cent. of the capital, surplus and undivided profits?

A. Yes, as reported to him by the bank for taxation.

Q. 224. You may state whether or not the report sent by the auditor of the county to the auditor of the State board of equalization contained that notation?

To which question defendant objected.

A. Ours did not.

Q. 225. I mean in 1896?

A. In 1896 it did as indicating the ones that he retained. I do not know what the ones that he sent down there contained. If he sent an exact copy they contained that writing.

Q. 226. That report of the county auditor for the year 1896 was approved by the State board of equalization for banks?

A. Yes, there is an approval certifying that they were left the same as the auditor had fixed them for that year.

Q. 227. You may state whether or not in fixing the valuation for bank shares in 1897, you were guided in your judgment by the valuation fixed in 1896 by the State board?

To which question defendant objected.

A. I was guided by the former return largely.

Q. 228. How do the returns of the years 1894 and 1895, as to percentage of valuation fixed for bank shares, agree with the reported valuation of 1896 and 1897?

To which question defendant objected.

A. I could not say without looking at the returns. All I can remember is knowing that there is such a notation on 1896.

Q. 229. When you became auditor the last time, do I understand you to say that you examined back a few years to see what percentage of the par or actual value securities and other obligations had been returned at for valuation in this county?

A. I naturally went back, because of an inquiry into one class of property. I go back to see what has been the custom.

180 Q. 230. Did you in 1897 follow the custom which you ascertained to exist for the few years preceding 1897?

To which question defendant objected.

A. Of course, I could not get around that from the very fact that it is so. It's there in figures.

Q. 231. You did follow the percentage of valuation that had been practiced for the years preceding?

A. Yes. I have said I was governed by the practice and custom that had been established in all kinds of property.

Q. 232. And in fixing the value of the bank shares for the year 1897, you were guided by that practice and custom?

A. I had that in view at that time. The banks are very apt to call our attention to the fact that that was the way it had been, and looking out for their own interests, lead us into looking into it, even if we hadn't thought of it. Our attention is called to all matters of custom by the outside public, without our having to hunt it up.

Q. 233. And having your attention called to it, you looked it up and fixed the valuation for 1897 as it had been fixed upon money, capital and credits and bank shares in previous years in this county?

A. I had banks exclusively in mind when I was assessing banks as they had been before.

Q. 234. Did you assess them in 1897 on the same percentage of valuation that they had been assessed the years before?

A. Yes, I think you will find the same percentage.

Q. 235. Was Mr. Guilbert, the present State auditor, the auditor of State and member of the board of equalization in the years 1895, 1896 and 1897?

A. He was in 1896, and I think he was in 1895. I am sure he was in 1896.

Q. 236. Do you know also that Governor Bushnell, who is now on his second term as governor, was also a member of the board of equalization for bank shares in the year 1896, as well as in the year 1897?

A. Yes, he must have been if he is on his second term.

Q. 237. And our distinquished brother who is present here, the attorney general, was he also on the board in 1896 and 1897?

A. He was in 1897, and he knows best as to 1896.

Q. 238. Assuming that the same board, the present board for the equalization of bank shares, viz: the governor, the auditor of State

and the attorney general, was composed of the same individ-
181 uals in 1896 that it was composed of in 1897, you then had the direction or precedent for your action in 1897, that they had fixed for the value of bank shares in the year 1896?

A. Yes, that had an influence upon my action.

Q. 239. You may state whether or not you fixed the percentage of actual value in the year 1897 at as high a figure as the State board of equalization fixed it for 1896?

A. I think it will average a little higher. It does on some banks.

Q. 240. I am speaking exclusively of the banks in Cleveland?

A. I thought some were deserving of a higher tax than others.

Q. 241. So you fixed it somewhat higher than the State board of equalization fixed it for 1896?

A. I think so, if I remember.

Q. 242. You may state whether or not the various shareholders who claim deduction in the Mercantile national bank for the year 1897, of their debts from the value of bank shares filed with you, or did the cashier of the bank for them, any affidavits?

A. Yes, the banks I think nearly all filed affidavits for deduction.

Q. 243. I understand you to say that the cashiers of the various national banks, the cashier of the Mercantile national and all others, did make their returns to you as required by the statute, and also filed with you affidavits made by the individual shareholders, claiming deductions in form, purport and effect of the one I now read.

Defendant objected to the introduction of the affidavit proposed now to be read and claimed to be given in the question in said form, for the reason that the original parties to this suit represented by the cashiers referred to are all living in the city of Cleveland, and the original affidavits can be had as the best evidence to be produced.

Defendant also objects for the further reason that the one in question is for the year 1898.

Counsel for plaintiff reads the following affidavit:

*Affidavit.*

"STATE OF OHIO, }
*Cuyahoga County,* } ss:

Edwin R. Perkins, being first duly sworn on his oath says that the Mercantile National Bank of Cleveland, Ohio, is a corporation organized and doing business at Cleveland, Ohio, under the act of
182 Congress known as "The national bank act," and the acts amendatory thereto, and its stockholders are subject to the provisions of, and entitled to the benefits conferred by section 5219 of the Revised Statutes of the United States, that on the day next preceding the second Monday of April, A. D. 1897, affiant was the owner of 325 shares of the par value of $100 per share,

and from said day next preceding the second Monday of April, 1897, he has continued to own and now owns said number of shares of stock in said bank. Affiant further says that on said day next preceding the second Monday of April, 1897, he was indebted and owing to others, and hitherto has continued to owe and still owes to others in legal *bona fide* debts the sum of $32,500 over and above any and all credits which by the law of Ohio he is entitled to deduct therefrom, and from which excess of debts over credits should be deducted $32,500, which deduction he claim- at the hands of the listing, assessing and taxing officers. Affiant says that in making up the sum of said debts owing to him in excess of the credits deducted therefrom, he has not included any claim or obligation which section 2730 of the Revised Statutes of Ohio requires to be rejected, which he is ready to make appear if required or permitted, by an exhibit of his indebtedness.

EDWIN R. PERKINS."

This is signed and sworn to before a notary.

A. Yes.

Q. 245. I will ask you whether or not that affidavit is of the same kind as the others?

A. Yes, I think all the affidavits are the same as this, in printed form.

Q. 246. Your statement in the cross-examination to the effect that the cashiers of the several banks made certain deductions from the capital, surplus and undivided profits, those deductions you understood were of bad debts?

A. Yes. I understood that they were matters in such a chaotic condition that they claimed a reduction on that account, and using the same rule we did with an affidavit of bad credits, it was out.

Q. 247. You treated it as a return of credits that were really credits of solvent persons?

A. Yes.

Q. 248. You have stated that you were auditor prior to your present incumbency?

A. Yes.

Q. 248. When?

183 A. From September, 1890, to September, 1893.

Q. 250. You may state whether during those years the valuation of national bank shares in the city of Cleveland was fixed at substantially the same percentage?

Objected to because the witness does not know personally.

A. Yes, that's my recollection. The records will show.

Q. 251. You may state whether the valuation of bank shares has been fixed at 60 per cent. of their actual value in the county of Cuyahoga by the auditor of the county since the decision of the Supreme Court of the United States in the case of The Mercantile National Bank against Horatio N. Whitbeck, treasurer of Cuyahoga county, in 1888?

A. I would not know anything except the years I was auditor.

Q. 252. You looked back into the records of your predecessor Mr. Shellentrager to ascertain what valuation he placed upon national bank shares with reference to their actual value?

A. I did the year 1896.

Q. 253. What did you find?

A. I found it written "60 per cent."

Q. 254. Do you say that that value for the years you were auditor from 1890 to 1893, and for the years 1897 and 1898, was about the percentage that was fixed upon other moneyed capital and credits owned by individual citizens?

A. I said that in assessing banks, about the only thing we thought of was the way the banks had been assessed. Never having examined the powers or the customs, we drifted along as the custom had been, without regard to property.

Q. 255. You may state whether or not the values you fixed on State bank shares was the same percentage as the valuation on national banks?

A. They were classed in the same rule in value.

Q. 256. You may state whether for the series of years when you were auditor, deductions of legal *bona fide* debts of the shareholders were made and allowed till the action of the State board in 1897?

To which question defendant objected as incompetent and irrelevant.

A. I think there was a time when the deductions requested were held in abeyance at least, but finally I think it was through the action of the supreme court that the board stopped it.

184 Q. 257. Prior to the action of the supreme court in the decision of the Chapman case you may state whether deductions had been allowed.

A. They had been allowed.

Q. 258. You may state whether they had been allowed and approved of the same grade and character as filed with you for the year 1897 in affidavits?

To which question defendant objected.

A. It was always upon the affidavits when they were allowed.

Q. 259. Affidavits of the kind above recited?

A. Yes.

Q. 260. You may state whether the form of the returns of the Mercantile national bank and the other national banks of Cleveland embracing all these who have actions against the treasurer in this court—were the same in the year 1897 that they were for former years?

A. The form?

Q. 261. Yes.

A. Yes, the forms were made the same since my knowledge of the county.

Q. 262. And the character of the reports is the same? I mean in form?

A. Yes, the form is the same.

Q. 263. Will you state, Mr. Auditor, what your personal recollection is as to the time that you sent blank forms to the cashiers of the various banks in the year 1897?

A. I left those with my deputy Mr. Jones, to mail out. We try to be very prompt in our office in everything we do. We send them out the moment we receive them from the State auditor. Probably they would not lay in our office more than over night. We had no date, and its does not require a letter with them because they know what it means, and we sent the blanks merely. My recollection is, this year I sent a letter.

Q. 264. I am speaking of the year 1897?

A. I didn't do that. I had no stamp upon it in 1897 showing when they were sent out, but I have a stamp when they returned, but I cannot tell you the date.

Q. 265. Do you know from personal knowledge whether or not they were sent to the various banks in the month of May, 1897?

A. Yes, we got a great many of them back in May, and they are all written May, 1897.

Q. 266. What time did you forward the valuation fixed by you to the State auditor in 1897?

A. I think it was the 19th of July.

185 Q. 267. All sent together to the State auditor?

A. Yes, all sent together.

Q. 268. Is there a return there made to you on May 18th?

A. Yes, here is one May 18th, the Park national bank.

Q. 269. You didn't send that return to Columbus until July 19th?

A. No, they were sent together.

Q. 270. You sent them to Columbus together?

A. Yes. I had to go out and hurry up some of them and get them in.

Q. 270. When was the action of the State board certified back to you, to be placed upon the duplicate of the county by the State board of equalization for bank shares for the year 1897?

A. I have the auditor of State's certificate here in regard to the amounts that they had added. It is dated Columbus, December 6th, 1897. They gave the names of the banks, the assessed value by the county auditor, and the action taken by the State board showing the total, signed by Guilbert, auditor of State.

Q. 271. Will you read that paper that it may go into the record?

A. Witness reads:

Auditor of State's office.

COLUMBUS, OHIO, *December* 6, 1897.

Auditor of Cuyahoga county.

DEAR SIR: You are hereby notified that the State board of equalization of bank shares has finished its labors and has fixed the valuation of the banks of your county as follows:

| Name of bank. | Assessed by county auditor. | Action by State board added. | Amount as fixed deducted by State board. |
|---|---|---|---|
| Central National Cleveland .... .... | 483,660 | 100,000 | 583,660 |
| Cleveland " " ..... | 273,600 | 65,000 | 338,600 |
| Commercial " " ..... | 926,790 | 240,000 | 1,166,790 |
| Euclid Ave. " " ..... | 282,450 | 55,000 | 337,450 |
| First " " .... ..... | 279,900 | 55,000 | 334,900 |
| Mercantile " " ..... | 519,320 | 123,000 | 642,320 |
| National Bank of Com. " ..... | 879,130 | 178,000 | 1,057,130 |
| National City " ..... | 250,460 | 77,000 | 327,460 |
| Park National " ..... | 299,400 | 10,000 | 309,400 |
| State " " ..... | 289,800 | 60,000 | 349,800 |
| Union " " . .... | 627,600 | 117,000 | 744,600 |
| Western Reserve " ..... | 590,280 | 74,000 | 664,280 |

The above is exclusive of real estate.

Respectfully,

W. D. GUILBERT,
*Auditor of State.*

186 Q. 272. You may state whether or not the valuation of incorporated bank shares for the year 1897, as equalized by the State board for bank shares, was certified back to you prior to that date. Did you have any other certificate?

A. No, sir. They all were under that date.

Q. 273. You may state, when you received the auditor's letter whether on the 6th or 7th.

A. I have a letter here dated December 9th that came right along with it undoubtedly.

Q. 274. You may read the letter received by you from the auditor of State December 9th, 1897.

A. Witness reads the following letter:

Auditor of State's office.

COLUMBUS, OHIO, *December* 9, 1897.

Honorable A. E. Akins, auditor, Cuyahoga county, Cleveland, Ohio.

DEAR SIR: In the hurry to get off report of final action of State board of equalization of banks to you, the fact was overlooked that the board had at one of its called meetings acted upon the returns of the South Cleveland Banking Company and the valuation as fixed by you, viz: $83,380 was affirmed. You will therefore kindly have the valuation conform to your original figures. Hoping this may cause you little inconvenience, I remain,

Very truly yours,

W. D. GUILBERT,
*Auditor of State.*
TAYLOR.

This letter came after I had received the others, and they called my attention to this and I made a memorandum of that fact and acted according to the advice given.

Q. 275. You will furnish these affidavits, and the letters to the cashier that accompanied them if you have them?

A. Yes. Last year I think there was no letters.

Counsel for defendant objected to any affidavits being introduced, and to any letters.

Recross-examination of ALBERT E. AKINS.

By Mr. MONNETT:

Q. 276. Do the affidavits that you have testified to in the re-examination purport to be the affidavits of the cashiers of the banks?

A. No, it is the affidavit of the stockholders.

187 Q. 277. This affidavit is sworn to by an attorney-in-fact, and not by the owner of the bank stock at all, is it not?

To which question plaintiff objected on the ground that the affidavit put into the hands of the witness is not the affidavit plaintiff has given in evidence.

A. This is what I brought over as a sample for the printed form, and we insert the names of the parties. This affidavit was made by the attorney-in-fact.

Q. 278. Do you know how many affidavits were filed and sworn to by attorneys-in-fact?

A. I will bring them over so you can know just how it was. This is 1898.

Q. 279. You stated that in fixing the value of the bank's assets for the purposes of taxation, you had the officers before you. Do I understand that some officer of every one of these twelve banks was before you in 1897?

A. If any discrepancy existed that we were not thoroughly aware what it meant, we called then in and had them explain.

Q. 280. There was a discrepancy in every bank between the comptroller's return and the return to you?

A. If there was, we had them all in. The way they did, they brought them in. Several of them were sworn to in our office. Mr. Wright and Mr. Forbes, who appear as notaries are in our office. They would come in and swear to them there, and make such explanation to Mr. Jones or to me as the case might be.

Q. 281. They were not sworn to when they explained?

A. No.

Q. 282. Will you explain to the court how it happens that you took into consideration the insolvency of the makers of the paper of bad debts in every one of the twelve banks? How is it that they have exactly the same ratio of bad debts?

A. I don't think that we worked that way. Some haven't as much deduction as others.

Q. 283. You were asked on re-examination if the returns you sent to the State board didn't amount to 60 per cent., or the amount they chose to return in the comptroller's return, and you said it was substantially that all the way through.

A. Yes.

Q. 284. Can you explain, if you took into consideration the unsworn testimony of the cashiers, how all the twelve banks had exactly the same amount to be deducted?

188 A. I cannot tell that year, but I have a statement we fixed this year. I see the weakness of the position. We depended more upon the statement made than on the written statement.

Q. 285. If the years 1896 and 1894 that the judge has called your attention to had been based upon false returns, and you sent them to the State auditor then these findings were based upon an erroneous state of facts, were they not?

A. If there was an erroneous statement, to us we would be in error.

Q. 286. So the custom was built up by the fact of their deducting these thousands of dollars before they handed you the returns?

A. We can get the reports and see. I don't think the custom of their making such discrepancies has existed into back years.

Q. 287. That custom of deducting for themselves a large amount, amounting to thousands of dollars, has been growing on the part of the banks till it has reached a condition that the entire twelve banks have deducted $6,272,000, including what they have asked you to deduct to equalize, amounting to upwards of $6,235,780, leaving but $6,036,220. Is that a fact?

A. That's the way it stands. These are the figures.

Q. 288. And that great discrepancy did not exist in past years as much as in 1897?

A. The records will show. I am aware from the investigation I made for taxation, and the facts that have come to me through different cashiers and representatives of the bank that their true condition was not as bad during 1890 and 1893 as that which exists at the present time. That they have said in confidence to me certain things that I am satisfied were true, and I satisfied myself the best I could before I was invited by certain banks to go to their books and see what they claimed. This year I required a statement of every bank to cover the point of last year that we hadn't a statement of. I think the difference that they made between the return for taxation and the comptroller's statement is a greater reduction this year than prior, because — the true state of facts that exists. The losses of the banks have been very large.

Q. 289. Do you mean that the effect of the panic in 1893 and 1894 did not leave more bad paper in their hands, than the prosperous year of 1897?

A. Our banks all suffered heavy blows last year. The Shipherd matter was a terrible blow.

189 Q. 290. And on your examination you found that every bank had exactly the same amount of insolvent paper?

A. No. I have a statement that will bear out what I did find for this year. Last year it was a very similar condition, and it worked out the same result.

Q. 291. You say the banks called your attention to the prior per cent. for former years that they had been assessed?

A. I said I didn't have to go into a careful examination of classes

of property to find how it was taxed, because the people themselves called our attention to it.

Q. 292. They wanted to remain at that 60 per cent.?

A. They probably thought they were taxed as high as the banks throughout the State.

Q. 293. You took 60 per cent., not of their actual face value, but 60 per cent. after they had made the deduction for bad paper?

A. They reported it as it was charged off.

Q. 294. Then you took an additional deduction?

A. I assessed it about the same percentage as formerly.

Q. 295. Didn't they try to offer you a horizontal reduction of 5 per cent. on their capital stock and surplus and undivided profits? Is not that Mr. Sullivan's theory?

A. 5 per cent. on their bills receivable—5 per cent. discount for bad debts.

Q. 296. That's the theory that they have gone on? This year they didn't point out the individual paper?

A. Some did and some didn't.

Q. 297. Where it didn't show on paper, they adopted the per-cent. rule? Is that th' way?

A. They have invariably claimed that some things were below par, and others were very bad and some not so bad, but that the average would make up that amount.

Q. 298. None of their testimony was sworn to?

A. No.

Q. 299. But the testimony to the Comptroller of the Currency, requiring to be accurately sworn to, you had, and it was different than they gave it?

A. Yes. I guess it was different. It differed just as it does when you assess the Cuyahoga block or the Society for Savings. We know it is not assessed for all it has cost.

Q. 300. And your real estate in West Cleveland is assessed for all it is worth?

A. No. The West Side was probably assessed high in 1890, and was reduced.

190 Q. 301. I mean outside of this illegal board.

A. There may be individual property that is assessed as high as it could be sold for. I think the valuation of the city is low, and real estate is assessed lower than it ought to be. I have always said that.

Q. 302. Do you have the custom here of a private party returning notes to the assessor, and the board of equalization on allowing them to go and make a reduction for bad paper?

A. If an individual comes and says he has $10,000 of paper, and that he is willing to dispose of it at $6,000, we will treat it as $6,000 worth of paper.

Q. 303. And then knock off 40 per cent. more of its true value in money?

A. I think it wouldn't be assessed at its true value. I think the value of different classes of properties has different per cents. I

have always avoided using any per cent. for anything in regard to property.

Q. 304. Isn't it a fact that your instructions to your taxing officers is to assess their property at the true value in money?

A. Yes, and then I explained to them the way true value in money was arrived at. There is as many different opinions in regard to that as there are people to try and explain it. I gave the instructions this year that it was money. A dollar is a dollar at its par value. I think the custom has grown from the people taking advantage and returning $600 for $1,000 and it being left alone; this has brought about a greater custom than the officers doing that for the people.

Q. 305. If such alleged custom exists, it has been the result of misstating on the part of the tax-payer?

A. The tax-payer has drawn conclusions and acted upon them, contrary to the knowledge of the officers, and the board of equalization has acquiesced in from 60 to 70 per cent. I have claimed for myself that I believe that when property was valued and the court would allow property to be sold under an appraisement, that the appraisement is allowed at two-thirds of that appraisement, it is fair to say, you get that amount for taxation.

Q. 306. Complying with the rule, and taking the return that these banks themselves make to the Comptroller of the Currency under oath, and take two-thirds of that as a tax basis, what has been the actual fact? Haven't they been undertaxed as compared with the entire twelve banks or any of them?

191 To which question plaintiff objected.

A. If it was appraised to what it was actually worth, I don't know how it would turn.

Q. 307. If the Federal Government under the Federal statute has asked these same plaintiff banks to report to the Comptroller of the Currency for the same month $12,272,000, and you have adopted the rule for other property to take two-thirds value, they themselves fix under oath to the Comptroller of the Currency, I will ask you whether that would not make them $8,000,000 where they are only on the tax duplicate for $6,036,000?

A. You take twelve manufacturers or twelve or more large buildings in the city, at their actual cost and their tax value, and the banks will stand very well in comparison with the other property if it is handled in the same way as you speak. You will find the banks will stand on a par with other classes of property that you may individualize out for the same amount of money. Take $12,000,000 of real estate at its cost value, and take its tax value, you will find the banks stand a higher per cent. of taxation.

Q. 308. I took the actual value as sworn to by the cashiers themselves, and you say courts will confirm a sale at two-thirds of that value?

A. No, I said that was a fair value.

Q. 309. You assume that they, going into a court of equity in the United States court in the same branch of the Government, when

they were reporting to the Comptroller of the Currency $12,000,000 of property and asking to be protected when they only reported $6,000,000, that that is fair?

A. I don't believe, you take the railroads or buildings or manufactories, that they will stand any better. I haven't been the whole thing here. I haven't been in existence only a few years. I follow customs.

Q. 310. You say you fix no per cent. of actual value. What do you mean by that?

A. I have done very much as the State board did, in one year possibly not doing as well as I think I will another year. If I could have my way—I have said so publicly since 1890—the values on the real and personal property here would certainly be under the law very much higher than they are now.

Q. 311. And come up with the rest of the State?

A. I don't know anything about the rest of the State. It has got to be a fact, everybody knows it. While I have known
192 that I have had boards of equalization that have had a good deal of authority and they have acted as they could.

Q. 312. Isn't it a fact that since 1897 the boards of equalization that are now outlawed have found this same property so much lower than they have listed, $100,000 the last two weeks?

To which question plaintiff objected.

A. That may be with a certain class of property. They haven't excited the world with any action yet.

Q. 313. Didn't the Brown Hoist Company have $41,000 and $31,000 at another time, and these corporations never winced to sign the report agreed on?

A. Only a little while ago I put on $100,000 on a concern that had only $20,000. That would surprise a man that has not been in the board of equalization.

Q. 314. The other corporations you have referred to have slipped in without your consent? There has been no custom established whereby you authorized that evasion?

A. No. I believe people are more to blame. They will shirk responsibility upon the officer in not coming after them. The people have misinterpreted the law and misunderstood the law. Some people are absolutely ignorant, and others try to be that I have to deal with, in tax matters.

Plaintiff objected to the answer.

Q. 315. The other banks that your attention was called to, didn't the State board raise them also?

A. I think they raised everything.

Q. 316. There was no discrimination as between the State and national banks under the action of the State law?

Objected to by plaintiff.

A. I don't know.

Q. 317. You may give the table to show what the State banks did?

To which question plaintiff objected on the grounds that it is utterly and totally irrelevant.

In answer to the foregoing question the witness furnished the stenographer the following two tables to be here copied and made a part of his testimony:

Auditor of State's office.

COLUMBUS, O., *Dec.* 6, 1897.

Auditor Cuyahoga county.

DEAR SIR: You are hereby notified that the State board of equalization of bank shares has finished its labors and has
193 fixed the valuation of the banks of your county as follows:

| Name of bank. | Assessed by county auditor. | Action of State board added. | Deducted. | Am't as fixed by State b'd. |
|---|---|---|---|---|
| Broadway Sav. & Loan Co., Clev.... | 212,630 | No change. | ..... | 212,630 |
| Cleveland Sav. & Bkg. Co., " ... | 24,780 | 5,000 | ..... | 29,780 |
| Chagrin Falls Bkg.Co.,Chagrin Falls. | 12,950 | 1,500 | ..... | 14,450 |
| Cleveland Trust Co., Cleveland..... | 324,720 | 30,000 | ..... | 354,720 |
| Cuyahoga Sav. & Bkg.Co.,Cleveland. | 27,120 | 3,000 | ..... | 30,120 |
| Columbia Sav. & Loan Co., " | 31,500 | 3,000 | ..... | 34,500 |
| Detroit Street " " | 28,380 | 3,000 | ..... | 31,380 |
| Dime Sav. & Bkg. Co., " | 172,730 | 39,000 | ..... | 211,730 |
| East End " " | 113,820 | 38,000 | ..... | 151,820 |
| Euclid Ave. " " | 114,540 | 6,500 | ..... | 121,040 |
| Forest City " " | 37,630 | 15,000 | ..... | 52,630 |
| Garfield " " | 30,000 | 3,500 | ..... | 33,500 |
| German Am. " " | 27,470 | 2,500 | ..... | 29,970 |
| Guardian Trust Co., " | 270,000 | 60,000 | ..... | 330,000 |

The above is exclusive of real estate.

Respectfully,

W. D. GUILBERT,
*Auditor of State.*

Auditor of State's office.

COLUMBUS, O., ——, 189–.

Auditor — county.

DEAR SIR: You are hereby notified that the State board of equalization of bank shares has finished its labors and has fixed the valuation of the banks of your county as follows:

| Name of bank. | Assessed by county auditor. | Action of State board added. | Deducted. | Am't as fixed by State b'd. |
|---|---|---|---|---|
| Lake Shore Bkg. & Sav. Co., Clev... | 54,840 | 5,500 | ..... | 60,340 |
| Lorain St. " " .. | 33,720 | 14,500 | ..... | 48,220 |
| Marine Bank Co., " .. | 118,530 | 3,800 | ..... | 122,330 |
| Merchants' Bkg. & Sotr. Co., " .. | 75,900 | No change. | ..... | 75,900 |
| Pearl St. Sav. & Loan Co., " .. | 28,740 | 12,000 | ..... | 40,740 |
| Produce Exc. Bkg. Co., " .. | 52,740 | 6,500 | ..... | 59,240 |
| South Clev. " " .. | 83,380 | 7,900 | ..... | 91,280 |
| United Bkg. & Sav. Co., " .. | 53,270 | No change. | ..... | 53,270 |
| Wade Park " " .. | 51,240 | " | ..... | 51,240 |
| West Cleveland Bkg. Co., " .. | 15,550 | 7,000 | ..... | 24,550 |
| Wick Bkg. & Trust Co., " .. | 147,600 | 4,800 | ..... | 152,400 |
| Woodland Ave. Sav. & Loan " .. | 176,100 | No change. | ..... | 176,100 |

The above is exclusive of real estate.

Respectfully,

W. D. GUILBERT,
*Auditor of State.*

Q. 318. Is there any discrimination in this city between the national and private banks, by the State officers that you know of?

To which question plaintiff objected.

194 A. I don't know.

Q. 319. Do the private banks make their own deductions before they report to you?

A. They do not have to make any report. They have no comptroller's report to be governed by, therefore we know nothing.

It is admitted by the parties hereto that the following items, which are introduced in evidence in connection with the testimony of Albert E. Akins, are taken from the report of the Comptroller of the Currency for 1897, vol. 1397. No. 59. Loans and discount, capital stock, surplus and other undivided profits, and circulation of national banks, on October 5, 1897.

Loans and discounts total country banks, Ohio, $66,570,637.93.

Page 396 of same volume.

Loans and discounts total central reserve cities:

Cincinnati..... ..... 23,778,025.25
Cleveland ..... 28,471,475.47

Page 761 of same volume.

Summary, by States, of the number of national banks, the important items of resources and liabilities, and the total resources, in thousands of dollars, as shown by latest returns in each annual report to Congress, from 1863 to 1897, inclusive.

Page 773 of same volume.

Ohio, 1897 ..... 118,820

Under date of August 18th, 1898, at 9 o'clock a. m., ALBERT E. AKINS, a witness heretofore produced in behalf of said complainant and heretofore duly sworn, deposes and says further as follows:

Direct examination.

By Judge BOYNTON:

Q. 1. Have you brought in this morning the affidavits that were made by the various shareholders, claiming deductions of debts from the assessed value of their bank shares?

A. I have.

Q. 2. Do you now present them?

A. These are the ones that were presented by the Mercantile national bank (handing counsel a roll of paper-writing.)

195 Q. 3. This is for the year 1897?

A. Yes.

Q. 4. Presented by whom?

A. By the cashier when he made their returns to me for the year 1897.

Q. 5. I put into your hands a letter bearing date December 7, 1897, purporting to be addressed to the cashier of the Mercantile national bank. You may state by whom it was written and sent to the bank? (Said letter is marked for identification "Akin Exhibit B 2.")

A. It is a letter from the auditor, myself as auditor. It does not bear my own handwriting or signature, but it bears the signature of my deputy. He placed my signature there by my order. I ordered the letters sent out to the banks.

Q. 6. Of this date?

A. Yes, December 7, 1897.

Q. 7. I understand you, you sent a similar letter to each of the other national banks?

A. Yes, all the same, with the different bank's name, and with the amounts of their various assessments. It was a matter of information sent to the banks.

Q. 8. Do you have in mind the rate of taxation for the State, county and city for the year 1897?

A. The total award was 2.93 on the 100 value.

Q. 9. About what do you recall the State portion of that?

A. I think it is 44 cents on the dollar, I mean taking this as 2.93 on 100 of value, 44 cents of that as I remember is the State tax. It may be 32 cents, I don't know.

Q. 10. You must be very wrong?

A. No, I cannot be very wrong.

Q. 11. You may state whether or not the papers I put into your hand now are the affidavits filed with you by the cashier of the Union national bank for the year 1897, purporting to give the debts of the stockholders of that bank claiming deduction?

A. These are not attached, but there is a rubber band around them, unless they have been unfolded. The others are attached. I

would say that was all that was filed, and they are the ones that were filed.

Q. 12. I put into your hands a similar package of papers for the First National Bank of Cleveland. You may state whether these are the affidavits filed with you by the cashier of that bank on behalf of the shareholders claiming deductions from the value of the bank shares?

A. Yes, these are the ones.

196 Q. 13. You may state whether these are the affidavits of the shareholders of the Cleveland national bank (handing witness another package of papers).

A. Yes, these are. The only chance for me to make an error is, we put these up this way and fasten them when we get them. It is barely possible in this box you will find some more of the Cleveland national that came afterward. These were handed to us by the Cleveland National Bank cashier.

Q. 14. I put into your hands affidavits filed with you by the cashier of the Central National Bank of the City of Cleveland?

A. Yes, these are the ones.

Q. 15. You may state whether the affidavits I now put into your hands are those filed by the cashier of the Park national bank for 1897?

A. Yes, they are the ones.

Q. 16. You may state whether the affidavits I now put into your hands are those filed by the cashier of the Commercial national bank.

A. Yes, they are the ones that were filed.

Q. 17. You may state whether the affidavits I now put into your hands are those filed by the cashier of the Euclid Avenue national bank for 1897.

A. They are the ones.

Q. 18. You may state whether the affidavits I now put into your hands are those filed by the cashier of the State national bank for 1897.

A. Yes, they are the affidavits.

Q. 19. You may state whether the affidavits I now put into your hands are those filed by the cashier of the National City bank for 1897.

A. They are the ones filed by the National City bank.

Q. 20. You may state whether the affidavits I now put into your hands are those filed by the cashier of the National Bank of Commerce for 1897.

A. Yes, they are the ones filed at that time.

Q. 21. You may state whether the affidavits I now put into your hands are those filed by the cashier of the Western Reserve national bank for 1897.

A. Yes, that is correct. They are the ones filed.

Q. 22. You may state whether the returns made by the cashier of the Mercantile national bank for the year 1897 contained a list of the names of their stockholders.

To which question defendant objected.

A. They did, as I remember, and the record will show.

Q. 23. You may state whether what I now hand you is the record of the return itself.

197 A. Yes, here is the return of the Mercantile national bank sworn to on page 13 of the Bank-book Returns for 1897.

Q. 24. Is that the return that the cashier of the bank for the year 1897 made to you?

A. It is.

Q. 25. Does it contain a list of the stockholders?

A. It contains a list of stockholders written together with the number of shares and their residence.

Q. 26. Will you turn in your record to the return made by the Central national bank?

A. It is on page 3 of this book called Bank Returns for 1897.

Q. 27. The paper there attached is the return made by the cashier of that bank for 1897?

A. Yes, this is the cashier's return.

Q. 28. Turn to the next.

A. The next is the Cleveland national bank, on page 5 of this same record, containing the returns with the names of the stockholders.

Q. 29. Give the next.

A. The next is the Commercial national bank, on page 7 of this same book, return with the stockholders' names attached.

Q. 30. Give the next.

A. Euclid Avenue national bank, page 9 of this same book, containing the return of the cashier for the bank with the names of the stockholders attached.

Q. 31. Give the next.

A. The First national bank, on page 11 of this same book, containing the return of the cashier for that bank with the names of the stockholders attached.

Q. 32. Give the next.

A. Page 13 of this same book, the Mercantile national bank, return of the cashier with the names of the stockholders attached.

Q. 33. Give the next.

A. Page 15 of this same book, the National Bank of Commerce, return made by the cashier of the bank with the names of the stockholders attached.

Q. 34. Give the next.

A. Page 17, National City bank, return of the cashier with the names of the stockholders attached.

Q. 35. Give the next.

A. Page 19, Park national bank, return of the cashier with the names of the stockholders attached.

Q. 36. Next.

A. Page 21, State national bank, return of the cashier with the names of the stockholders attached.

198 Q. 37. Next.

A. Page 23, Union national bank, return made by the cashier with the names of the stockholders attached.

Q. 38. Next.

A. Page 25, Western Reserve national bank, return made by the cashier with the names of the stockholders attached.

Q. 39. You may state if each of these returns purport to give you the resources and liabilities of the banks with the names and places of residence of the stockholders of the banks.

To which question defendant objected.

A. That's the purport of the return.

Q. 40. I will ask you whether or not you requested any other information from them than what is given on the blanks, or did they give you such information as the blanks required of them.

To which question defendant objected.

A. Yes, they gave other information verbally. They came before me in addition to this.

Q. 41. Have you any reason to believe that the name of any stockholder of any bank was omitted from the return?

To which question defendant objected.

A. I haven't any reason to believe it.

Q. 42. The report of the auditor of State is made up of returns of the various auditors from the State. Do you know whether that is so or not?

A. Yes, we got the report of the auditor of State made up from the reports made to him from the auditors throughout the State.

Q. 43. You may state whether or not a printed report to the auditor of State for each year is sent out throughout the State as containing a true statement of the taxable valuations fixed on property throughout the State?

To which question defendant objected.

A. We get a copy of it and I suppose it is sent to other parts of the State, purporting to be an abstract of the personal property as certified to from the counties to the State auditor. I never checked our counties down to see if it is right.

Q. 44. You may state whether or not the affidavits you have stated were furnished to you by the cashiers of the several banks are in the form of affidavits that have been used for a number of years in the county of Cuyahoga.

To which question defendant objected.

199 A. We had a form here yesterday that I said was the form. I drew the conclusion, thinking that they were all alike. I think that is so, but I notice in different banks there are different sizes of copies used, or different printing. I would have to read one with the other to be sure that they are all the same. I think, without a question, they are all the same.

Defendant objected to the answer and moved the court to order the same stricken from the record.

Cross-examination of ALBERT E. AKINS.

By Mr. BENNETT:

Q. 45. Mr. Auditor, have you the blank form that is sent by the State auditor to you as a form for the purpose of you giving the same to the national banks of your city and having them make return for taxation upon the same?

A. I have a form before me that has been filled out by them. That was a blank before it was filled out. I have none that has not been filled.

Q. 46. Can you furnish an extra blank form of the kind that has been in use for years by yourself and your predecessor, and especially during the year 1897, upon which national banks are directed to make their returns to you for taxation?

A. I will try and get one. I think we have one of 1898, which is the same as 1897.

Q. 47. If you can get one similar to the kind that the returns were made upon in the year 1897 by national banks, will you hand it to the stenographer and have her mark it "Akin Exhibit C" and make it part of your testimony?

To which question plaintiff objected on the grounds that there is no statute of the State requiring banks or any other owner of property to list it on a form such as constitutes "Akin Exhibit C."

A. I will see if I can get one.

Said blank marked for identification "Akins' Exhibit C," is hereto attached as an exhibit and made a part of the testimony of this witness.

Q. 48. Have you in your office a full and accurate list of the names and residences of the stockholders in each of the several plaintiff banks, showing the number of shares held by each and the residences and addresses of the several stockholders for the year 1897?

A. Yes, I have in every case of a return of a bank attached to that a list of the stockholders, but not in every case the residence carried out. In most cases they are, but in a few they are not.

Q. 49. You cannot testify of your own knowledge that each
200 stockholder has been truthfully reported by the cashier making his returns to you, nor can you testify that the number of shares affixed to their names, respectively, are the true number of shares held by such stockholder, can you?

A. No, I don't know that those things are so, only as they are sworn to and attached to the return.

Q. 50. You can only say with regard to these lists of stockholders and the number of shares affixed to each name that the same has been returned to you by the cashier; but personally you cannot say

whether their names and their number and shares have been truthfully affixed thereto or not?

A. No. I take it for granted it is right. That is all.

Q. 51. You have no other evidence of any stockholders in any of the several plaintiff banks, outside of the *ex parte* statements or affidavits made up by the cashiers of the several banks?

A. I have nothing.

Q. 52. Do the returns as testified to by you, and contained in the book called Bank Returns for 1897, now lying before you, show the reports, changes and alterations made in such returns by the State board of equalization of bank values?

To which question plaintiff objected.

A. No, these do not go to the State. These stay with us. They are copies. The originals don't go. We send duplicates.

Q. 53. So what you have been testifying from being the original returns made by the cashiers of the several plaintiff banks to yourself as county auditor does not show the amounts agreed upon by the State board of equalization as the amounts which the several banks should be assessed at for the purpose of taxation?

A. They show no corrections.

Q. 54. So then they don't show the amounts against which the said several plaintiffs are complaining in this action, but they do show the amounts prior to the alterations as made in them by the State board of equalization?

A. You are correct.

Q. 55. You know nothing with regard to whether or not the matters set forth in the affidavits to which you have testified as having been filed, nor the affidavits by the various cashiers of the national banks of this city, as to whether they are true or not true, outside of the affidavits themselves?

201 A. That's the only information we have, excepting statements made verbally to us of the reasons why they were not as the comptroller's statement.

Q. 56. And these affidavits were filed with you and these statements made to you prior to the final action of the board of equalization for bank values which was subsequently made, after these affidavits were filed with you. Is that not true?

A. Yes, these statements made were made at the same time of the return being filed or immediately thereafter, before certifying our action to the State board.

Q. 57. Can you give of your own knowledge the name of the stockholders in the various plaintiff banks who are known residents of the State of Ohio?

A. No.

Q. 58. You have no personal information of that whatsoever, have you?

A. No.

Q. 59. The letter which was handed to you and identified by you as a letter that emanated from your office, and was directed to each

of the national banks of the city, was not a letter coming to you from the auditor of State or the State board of equalization?

A. No, it was based upon a letter that I received. I think I received a letter with the statement.

Q. 60. When you say that this letter of December 7th, 1897, which has not been introduced in evidence, was based upon a letter sent to you by the auditor of State, you merely mean to say that the amount contained in that letter is all that is in that letter that was copied from the letter of the auditor of State to you, do you not?

To which question plaintiff objected, on the ground that the letter speaks for itself.

A. Yes. I don't have the letter in my office that accompanied these reports. I may have one and I may not, that explains.

Q. 61. What precedes and what succeeds the statement of the amounts contained in the letter referred to is merely your own wording or direction or order given you by the auditor of State or the State board of equalization for bank values?

A. Yes, I sent out these letters of my own volition, giving the amounts certified to us.

Plaintiff at this point introduced in evidence said letter marked for identification "Akins' Exhibit B 2," to which defendant objected.

Said letter is in the words and figures following, to wit:

202 "AIKNS EXHIBIT B 2."

Cuyahoga county auditor's office.

A. E. Akins, auditor. O. L. Jones, deputy.

CLEVELAND, O., *Dec. 7th*, 1897.

To the cashier of Mercantile bank.

DEAR SIR: After much delay on the part of the State board of equalization, I am just notified of the action upon the banks' return as made by me to the State auditor, as a return for taxation for the year 1897 duplicate.

| | |
|---|---|
| The amount returned by this office amounted to..... | $519,320 |
| The amount added by the State board ..... | 123,000 |
| Making a total for the duplicate of ..... | $642,320 |

This action comes with some surprise to this office, and I presume will cause the same with the banks. I had been told by the State auditor, personally, that he thought that we had placed a very low percentage upon the banks for the year 1897. Further than that I had received no knowledge of the intended action of the State board.

Very truly yours,

A. E. AKINS,
*County Auditor.*

Defendant objected to the introduction of the foregoing letter "Akins Exhibit B 2," and now moves the court to have the same stricken from the record for the reason that section 2810 of the Revised Statutes of Ohio provides that the action of the State board shall be certified to the various county auditors, and each valuation shall be put upon the proper tax-list and no authority or direction is given to the auditor to issue any statement to any of the banks in question.

Form 32—1000.

Forms for bank statements, in duplicate, under provisions of sections 2762, 2763, 2764, 2765, 2766, 2767, 2768, and 2769 and amended sections 2766, 2808, 2809, 2810, Revised Statutes of Ohio. See O. L., vol. 80, pp. 54 and 55.

203 *Banks or Banking Associations Organized under the Laws of the State of Ohio or of the United States.*

To the cashier of the — bank, ——, Ohio.

SIR: You are hereby required to make out upon the forms herewith, and return to me at my office, at ——, in the county of ——, Ohio, on or before the second Monday of May, A. D. 189–, a report in duplicate, under oath, exhibiting in detail the resources and liabilities of the above bank or banking association, at the close of business on the first Wednesday after the first Monday of May preceding such report, together with a full statement of the names and residences of stockholders therein, with the number of shares held by each, and the par value of each share. You are also required to accompany this return with a copy of the report of the Comptroller of the Currency, made next prior to the second Monday of May, 189–.

Dated —— —, 189–.

——— ———,
*Auditor of —— County, Ohio.*

*Resources.*

Loans and discounts.....
Overdrafts.....
U. S. bonds to secure circulation.....
U. S. bonds to secure deposits.....
U. S. bonds on hand.....
Other stocks, bonds and mortgages.....
Due from approved reserve agents.....
Due from other banks and bankers.....
Real estate, furniture and fixtures.....
Current expenses and taxes paid.....
Premiums paid.....
Checks and other cash items.....
Exchanges for clearing-house.....
Bills of other banks.....

Fractional currency.....
Specie.....
Legal-tender notes.....
U. S. certificates of deposit.....
Due from U. S. Treasurer.....

204 AKINS EXHIBIT C.

Total.....

*Liabilities.*

Capital stock paid in.....
Surplus fund.....
Other undivided profits.....
National bank notes outstanding.....
State bank notes outstanding.....
Dividends unpaid.....
Individual deposits.....
United States deposits.....
Deposits of U. S. disbursing officers.....
Due to other national banks.....
Due to State banks and bankers.....
Notes and bills rediscounted.....
Bills payable.....

Total.....

The par value of each share of the stock of this bank is — dollars, and the appraised value (for taxation) of the real estate owned by the bank is — dollars. See affidavit upon third page of this report.

—— ——, *Cashier.*

| Names of stockholders. | Residences. | No. of shares. |
|---|---|---|
| Amount carried forward..... | | |

*Statement*—Continued.

| Names of stockholders. | Residences. | No. of shares. |
|---|---|---|
| Amount brought forward..... | | |
| Total number of shares..... | | |

*Affidavit.*

THE STATE OF OHIO, }
—— *County,* } *ss:*

205 I, —— ——, cashier of — bank of ——, Ohio, do solemnly swear that the foregoing is a correct statement of the resources and liabilities, of the names and residences of the

stockholders, of the number of shares held by each, of the par value of the shares of said bank at the close of business on the first Wednesday after the first Monday of May, 189–.

—— ——, *Cashier.*

Sworn and subscribed to before me, a — in and for said county, this — day of —— 189–.

—— ——.

(In duplicate.)

Office of the auditor of —— county.

——, OHIO, ——, 189–.

To the State board of equalization for incorporated banks:

I hereby certify that I have fixed the value of the shares of — Bank of —— for the year 189–, as follows:

— shares of par value of $—..... $
From which is to be deducted the value of the real estate owned by said bank which stands upon the duplicate at..

Leaving taxable valuation of shares at..... $

—— ——,
*Auditor —— County, Ohio.*

This return to be made to the auditor of State for the use of the State board of equalization of incorporated banks on or before the 10th day of June.

Annual statement of the — Bank of ——, —— county, Ohio. —. Received at the county auditor's office, —— 189–.

Thereupon, in connection with the testimony of the foregoing witness, Albert E. Akins, plaintiff introduced in evidence the return made to the county auditor in the year 1897 of the Mercantile national bank, which was testified to as having been made to said auditor by the cashier of the Mercantile national bank for the year 1897.

206 To which defendant objected for the reason that the same does not contain the statement of change made in said return, by the State board of equalization, and does not contain the amounts as amended by said State board of equalization and contained in the complaint of plaintiff herein.

Said return is in the words and figures following, to wit:

Form 32—1000.

Forms for bank statements, in duplicate, under provisions of sections 2762, 2763, 2764, 2765, 2766, 2767, 2768, and 2769, and amended sections 2766, 2808, 2809, 2810, Revised Statutes of Ohio. See O. L., vol. 80, pp. 54 and 55.

*Banks or Banking Associations Organized under the Laws of the State of Ohio or of the United States.*

To the cashier of the Mercantile national bank, —— Ohio.

SIR: You are hereby required to make out upon the forms herewith, and return to me at my office, at Cleveland, in the county of Cuyahoga, Ohio, on or before the second Monday of May, A. D. 189–, a report in duplicate, under oath, exhibiting in detail the resources and liabilities of the above bank or banking association, at the close of business on the first Wednesday after the first Monday of May preceding such report, together with a full statement of the names and residences of stockholders therein, with the number of shares held by each, and the par value of each share. You are also required to accompany this return with a copy of the report of the Comptroller of the Currency, made next prior to the second Monday of May, 189–.

Dated May, 1897.

A. E. AKINS,
*Auditor of Cuyahoga County, Ohio.*

*Resources.*

| | | |
|---|---|---|
| Loans and discounts | $2,126,165 | 74 |
| Overdrafts | 1,683 | 73 |
| U. S. bonds to secure circulation | 470,000 | |
| U. S. bonds to secure deposits | | |
| U. S. bonds on hand | | |
| Other stocks, bonds and mortgages | 51,500 | |
| 207 Due from approved reserve agents | 172,914 | 94 |
| Due from other banks and bankers | 136,773 | 89 |
| Real estate, furniture and fixtures | 300,000 | |
| Current expenses and taxes paid | 9,328 | 52 |
| Premiums paid | 18,000 | |
| Checks and other cash items | 2,405 | 62 |
| Exchanges for clearing-house | 17,188 | 59 |
| Bills of other banks | 34,938 | |
| Fractional currency | 332 | 13 |
| Specie | 344,700 | |
| Legal-tender notes | 30,000 | |
| U. S. certificates of deposit | | |
| Due from U. S. Treasurer | 21,150 | |
| Total | $3,737,081 | 16 |

*Liabilities.*

| | | |
|---|---|---|
| Capital stock paid in | $1,000,000 | |
| Surplus fund | | |
| Other undivided profits | 174,541 | 49 |
| National bank notes outstanding | 355,900 | |
| State bank notes outstanding | | |
| Dividends unpaid | 15,099 | |
| Individual deposits | 1,839,669 | 42 |
| United States deposits | | |
| Deposits of U. S. disbursing officers | | |
| Due to other national banks | 45,016 | 01 |
| Due to State banks and bankers | 6,855 | 24 |
| Notes and bills rediscounted | | |
| Bills payable | | |
| U. S. bond acc't | 300,000 | |
| Total | $3,737,081 | 16 |

The par value of each share of the stock of this bank is one hundred dollars, and the appraised value (for taxation) of the real estate owned by the bank is $117,370. See affidavit upon third page of this report.

CHAS. L. MURFEY, *Cashier.*

208

| Names of stockholders. | Residences. | No. of shares. |
|---|---|---|
| Amount carried forward | | |
| Name of stockholders. | Residences. | No. of shares. |
| Annin, Mrs. Hattie M., | Marseilles, Ind | 39 |
| Akers, W. J., | Cleveland | 25 |
| Akers, Miss Mattie, | Cleveland | 25 |
| Armstrong, Mary E., trustee, | Cleveland | 50 |
| Bingham, Wm., | Cleveland | 150 |
| Bingham, Mrs. Mary P., | Cleveland | 300 |
| Bingham, Cassie F., | Cleveland | 50 |
| Barnett, James S., | Cleveland | 400 |
| Beckwith, Mrs. Sarah E., | Cleveland | 100 |
| Benedict, Mrs. Sarah K., | Cleveland | 45 |
| Benedict, Mrs. Clara W. | | 7 |
| Backus, Mrs. Lucy M., | Cleveland | 225 |
| Baldwin, E. F., | New York | 25 |
| Baldwin, Irving, | New York | 25 |
| Baldwin, S. Prentiss, | Cleveland | 53 |
| Baldwin, Mrs. Caroline P. | | 24 |
| Bliss, Stoughton, estate of, | Cleveland | 100 |
| Childs, Edward H., | Cleveland | 55 |
| Cleveland, J. D., in trust, | Cleveland | 25 |
| Cleveland, J. D., in trust, | Cleveland | 25 |

| | | |
|---|---|---|
| | Coit, Mrs. E. J. W., Concord, N. H. | 37 |
| | Collins, Mrs. Jane K., Cambridgeport, Mass. | 35 |
| | Cole, Mrs. Alice K., Cleveland | 150 |
| | Cole, Newcomb B., Cleveland | 50 |
| | Crowell, Mrs. Annie C., Cleveland | 120 |
| | Corner, Horace B., Cleveland | 20 |
| | Cutler, Mrs. C. A. P., Cleveland | 50 |
| | Chamberlain, Joseph P., Santa Barbara, Cal | 100 |
| | Chamberlain, Selah, Santa Barbara, Cal | 100 |
| | Dagleish, R. T., Cleveland | 10 |
| | Foot, Agnes B., Cleveland | 15 |
| | Ford, S. O., Cleveland | 35 |
| | Gardner, Geo. W., Cleveland | 103 |
| | Gordon, W. J., estate of, Cleveland | 200 |
| | Goodrich, Mrs. M. P., New Haven, Conn | |
| | Goldsmith, Joseph Feiss & Co., Cleveland | 40 |
| | Hamilton, Mary E., Cleveland | 200 |
| | Handy, T. P., Cleveland | 50 |
| | Hawley, R. K., New York | 400 |
| | Hawley, Mrs. Virginia F., New York | 50 |
| | Harkness, Chas. W., New York | 50 |
| 209 | Howe, Geo. W., Cleveland | 14 |
| | Howe, Geo. W., trustee, Cleveland | 25 |
| | Howe, Mrs. Kate L., Cleveland | 63 |
| | Hines, J. N., estate, Cleveland | 32 |
| | Hitchcock, Sarah W., Cleveland | 63 |
| | Isom, E. S., Cleveland | 50 |
| | Claflen, Margaret R., Boston, Mass. | 100 |
| | Johnson, F. C., Cleveland | 12 |
| | Jones, Orville L., Cleveland | 10 |
| | Kyle, Mrs. Louisa J., Cleveland | 62 |
| | Levy, Isaac, Cleveland | 20 |
| | Lynch, Frank, estate, Cleveland | 40 |
| | Leffingwell, Lucy A., Cleveland | 100 |
| | Mather, S. L., estate of, Cleveland | 50 |
| | Mather, Samuel, Cleveland | 215 |
| | Mather, S. H., estate of, Cleveland | 18 |
| | Mather, Mrs. Flora S., Cleveland | 50 |
| | Mather, Wm. G., Cleveland | 280 |
| | Mather, Kate L., Cleveland | 70 |
| | Mather, Mrs. E. L., Cleveland | 50 |
| | McKean, N. P., Cleveland | 85 |
| | Murfey, Mrs. J. A., Cleveland | 50 |
| | Murfey, Chas. L., Cleveland | 73 |
| | Murfey, L. A., Cleveland | 65 |
| | Otis, Mrs. Laura L., Cleveland | 40 |
| | Painter, J. V., Cleveland | 160 |
| | Perkins, E. R., Willoughby | 400 |
| | Perkins, trustee Chamberlain estate, Willoughby | 530, 10 |
| | Perkins, Mrs. Harriet P., Willoughby | 1,196 |
| | Perkins, Mary W., Willoughby | 5 |

| | | |
|---|---|---|
| | Pierce, Mrs. M. A., Cleveland | 5 |
| | Prentice, Mrs. G. A., Cleveland | 35 |
| | Price, W. A., Cleveland | 100 |
| | Rainey, W. J., Cleveland | 100 |
| | Ranney, H. C., Cleveland | 200 |
| | Ranney, Chas. P., Cleveland | 25 |
| | Ranney, John R., Cleveland | 33, 33 |
| | Ranney, Mrs. A. W., Cleveland | 34 |
| | Rees, W. D., Cleveland | 100 |
| | Root, Mrs. Lizzie H., Manchester, N. H | 26 |
| | Root, Orville H., Cleveland | 12 |
| | Rust, Jno. F., Cleveland | 100 |
| | Sanders, W. B., Cleveland | 16 |
| | Sawyer, Mrs. Mary B., Cleveland | 23 |
| | Spencer, P. M., Cleveland | 50 |
| | Sherman, John, Mansfield | 100 |
| | Sherman, Mrs. Sarah R., Cleveland | 5 |
| 210 | Smith, Reuben F., Cleveland | 96 |
| | Smith, Reuben F., trustee "B.," Cleveland | 24 |
| | Smith, John B., estate of, Cleveland | 100 |
| | Scott, Chas. O., Cleveland | 100 |
| | Stone, Ithiel, Cleveland | 100 |
| | Stearn, A., Cleveland | 40 |
| | Severance, L. H., Cleveland | 1 |
| | Tyler, W. S., Cleveland | 260 |
| | Tyler, Mrs. Marion C., Cleveland | 46 |
| | Upson, A. S., Cleveland | 25 |
| | Vincent, Jno. A., estate, Cleveland | 150 |
| | Waite, Mrs. Fanny P., Cleveland | 50 |
| | Williamson, Sam'l E., Cleveland | 100 |
| | Winslow, Lucy B., Cleveland | 30 |
| | Withington, A. L., Cleveland | 30 |
| | Wade, J. H., estate of, Cleveland | 200 |
| | Yates, Mrs. Antoinette B | 50 |
| | | 10,000 |

*Statement of Real Estate Owned by the Mercantile National Bank.*

Listed on the tax duplicate of Cuyahoga county and properly deductable from the bank's return for taxation for the year 1897.

| Name on duplicate. | Location. | Lot, feet front. | Street. | Tax value. |
|---|---|---|---|---|
| | | | | *Dollars.* |
| Mercantile nat'l bk..... | Cleveland.... | 212 20 | Sycamore..... .. | 1,050 |
| " .. .. | " .... | 213 20 | " ..... | 870 |
| " ..... | " .... | 214 16 | " ..... | 450 |
| " ..... | " .... | 215 20 | " ..... | 300 |
| " ..... | " .... | 216 20 | " . .... | 140 |
| " ..... | " .... | 217 12 | " ..... ... | 60 |
| " ..... | " .... | H 231 | West River ..... | 16,540 |
| " .. .. | " .... | 22-9 | Superior .... ..... | 34,420 |
| " ..... | " .... | 22 | Bank ..... ..... | 17,240 |
| " ..... | " .... | 19 | " ..... | 15,360 |
| " ..... | " .... | 22-7 | Superior ..... | 30,940 |
| | | | | 117,370 |

*Statement Continued.*

| Names of stockholders. | Residences. | No. of shares. |
|---|---|---|
| Amount brought forward..... | | |
| Total number of shares..... | | |

*Affidavit.*

THE STATE OF OHIO, }
*Cuyahoga County,* } ss:

I, Chas. L. Murfey, cashier of the Mercantile National Bank, of Cleveland, Ohio, do solemnly swear that the foregoing is a
211 correct statement of the resources and liabilities, of the names and residences of the stockholders, of the number of shares held by each of the par value of the shares of said bank at the close of business on the first Wednesday after the first Monday of May, 189–.

CHAS. L. MURFEY, *Cashier.*

Sworn and subscribed to before me a notary public in and for said county, this 8 day of June, 1897.

ALBERT STRAUS,
*Notary Public.*

(In duplicate.)

Office of the auditor of Cuyahoga county.

CLEVELAND, OHIO, *July* 19, 1897.

To the State board of equalization for incorporated banks:

I hereby certify that I have fixed the value of the shares of Mercantile National Bank of Cleveland for the year 189–, as follows:

10,000 shares of par value of $100..... $636,690
From which is to be deducted the value of the real estate owned by said bank which stands upon the duplicate at..... 117,370

Leaving taxable valuation of shares at..... ..$519,320

A. E. AKINS,
*Auditor Cuyahoga County, Ohio.*

This return to be made to the auditor of State for the use of the State board of equalization of incorporated banks on or before the 10th day of June.

Annual statement of the Mercantile National Bank of Cleveland, Cuyahoga county, Ohio. Received at the county auditor's office, Jan. 15, 1897.

JOHN VAN NOSTRAND, a witness produced in behalf of said complainant, being duly sworn, deposes and says as follows:

Direct examination.

By Judge BOYNTON:

Q. 1. You may state your name and occupation.

212 A. John Van Nostrand, deputy clerk of the United States circuit court of the northern district of Ohio, eastern division.

Q. 2. You may state whether the record book No. 14, chancery records, is the chancery record of cases decided by the circuit court of the United States for the northern district of Ohio?

To which question defendant objected.

A. It is. It contains the final record of cases.

Q. 3. You may state whether it is the final record book of the court?

To which question defendant objected.

A. Yes.

Q. 4. You may state whether the record book No. 15, chancery records, is the chancery record of cases decided by the circuit court of the United States for the northern district of Ohio.

To which question defendant objected.

A. It is. It contains the final record of cases.

Q. 5. You may state whether it is the final record book of the court.

To which question defendant objected.

A. Yes.

Q. 6. You may state whether the record book No. 16, chancery records, is the chancery record of cases decided by the circuit court of the United States for the northern district of Ohio.

To which question defendant objected.

A. It is. It contains the final record of cases.

Q. 7. You may state whether it is the final record book of the court?

To which question defendant objected.

A. Yes.

Q. 8. You may state whether the record book No. 17, chancery records is the chancery record of cases decided by the circuit court of the United States for the northern district of Ohio.

To which question defendant objected.

A. It is. It contains the final record of cases.

Q. 9. You may state whether it is the final record book of the court.

To which question defendant objected.

A. Yes.

Q. 10. You may state whether the record book No. 20, chancery records, is the chancery record of cases decided by the circuit court of the United States for the northern district of Ohio?

213 To which question defendant objected.

A. It is. It contains the final record of cases.

Q. 11. You may state whether it is the final record book of the court?

To which question defendant objected.

A. Yes.

Q. 12. They are the books of the final records of the court of chancery of the circuit court of United States for the northern district of Ohio, eastern division?

To which question defendant objected.

A. They are.

Q. 13. Now in the possession of the clerk of the court as such records?

To which question defendant objected.

A. Yes.

Thereupon, plaintiff offered in evidence the record in the case of The Mercantile National Bank of Cleveland *vs.* Horatio N. Whitbeck, treasurer of Cuyahoga county, Ohio, found in chancery record, No. 14, U. S. circuit court, northern district of Ohio, eastern division, pages 624 to 643, inclusive. Said record is in the words and figures following, to wit:

To which defendant objected.

October Term, 1886.

No. 4411.

At a stated term of the circuit court of the United States for the eastern division of the northern district of Ohio, begun and held in the city of Cleveland in said district on the first Tuesday in October, being the fifth day of said month in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States of America the one hundred and tenth.

Present, the Honorable Howell E. Jackson, circuit judge, and the Honorable Martin Welker, district judge.

In the record and proceedings of said court then and there held among other things appeared the following, to wit:

214 THE MERCANTILE NATIONAL BANK OF CLEVELAND
*vs.*
HORATIO N. WHITBECK, Treasurer of Cuyahoga County, Ohio.

*Bill.*

Be it remembered that heretofore, to wit, on the 17th day of December, A. D. 1885, there was filed in the clerk's office of said court the following bill of complaint in the above-entitled cause, which bill is in the words and figures, to wit:

In the Circuit Court of the United States of America within and for the Northern District of Ohio, Eastern Division, *ss:*

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, Complainant,
*vs.*
HENRY N. WHITBECK, Treasurer of Cuyahoga County, Ohio, Defendant.
} Bill.

To the honorable the judges of the circuit court of the United States for the northern district of Ohio, eastern division:

Your orator, The Mercantile National Bank of Cleveland, Ohio, respectfully represents that it is a national banking association incorporated under and by virtue of the act of Congress entitled, "An act to provide for a national currency secured by the pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3rd, 1864, and the amendments thereof, and is established and doing business in the city of Cleveland in said northern district of Ohio, and brings this, its bill of complaint against Henry N. Whitbeck, treasurer of Cuyahoga county, Ohio, a resident of said city of Cleveland, Ohio, and a citizen of Ohio, and of said northern district, eastern division; and the grievance herein complained of arises and is exclusively founded on a violation by the defendant and others, whose unlawful acts
215 he is carrying into effect, of rights of the shareholders of said national bank, accorded them by section 5219 of the

Revised Statutes of the United States, secured to said shareholders a restriction upon the taxation of the shares of stock of said bank by State authority, to that rate and limit assessed upon other moneyed capital in the hands of individual citizens of the State, as will herein fully appear. And thereupon, your orator complains and says that it has a capital stock of $1,000,000 *dollars* divided into ten thousand shares of one hundred dollars each, all of which is paid up, and certificates for the shares outstanding and owned by a large number of persons, some of whom are now residents of the said State of Ohio and citizens of other States; that, in accordance with section 2765 of the Revised Statutes of the State of Ohio, then in force, the cashier of your orator duly reported, in duplicate, to the auditor of said county, the resources and liabilities of said banking association at the close of business on the Wednesday next preceding the second Monday in May, 1885, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and the par value of each share, as required by said section 2765; that, included in said return so made by said cashier, was the real estate owned by your orator at a valuation of $163,060.00, which was already valued and equalized in conjunction with all the other real estate in the city of Cleveland by the proper board of equalization at a taxable value of $163,060.00, which tax on said real estate so valued in said return at the sum of $163,060.00, being the sum paid by said bank therefor—is otherwise and separately assessed and charged on the tax duplicate of said county, and paid by this complainant to the treasurer of the said county aside from the taxes set forth in this bill; that, thereupon, the said auditor pretended to proceed as required by section 2766 of the Revised Statutes of Ohio, as amended March 9th, 1883, to fix the total value of such shares according to their true value in money and fixed the same at $444,820.00, exclusive of the assessed value of its real estate; and made out and transmitted to the annual State board of equalization for incorporated banks a copy of the report so made by said cashier, together with the valuation of such shares as so fixed by said auditor; and your orator, from information and belief, alleges that the said county auditor, for the purpose of more accurately determining and fixing the value of said shares, did meet with and consult the board of equalization for the city
216 of Cleveland and the valuation by him reported to the State board of equalization was fixed and determined upon by said auditor with the assistance and approval of said city board of equalization, that it is by law, the duty of said city board of equalization to value and equalize for taxation all moneyed capital and personal property of every kind in the hands of individual citizens of the State of Ohio, resident in said city, except only the capital, assets and shares of incorporated banks, that being the only property under the statute aforesaid referred to said State board of equalization to be equalized; that said auditor placed a value upon said shares which was, in fact, and was known by him to be far in excess of the value fixed in said county on other moneyed capital in the hands of individual citizens of the State of Ohio, and of said city

and county; that the said State board of equalization assuming and pretending to comply with the requirements of section- 2808 and 2809 of the said Revised Statutes as amended March 9th, 1883, did examine the return aforesaid made by said cashier to said county auditor, and the value of such shares as fixed by said county auditor; but that said State board of equalization did not examine as required by law, any other returns made by said county auditor to the State auditor, and the said board did then pretend to equalize said shares to their true value in money, and fixed the valuation thereof at $495,774.76, exclusive of the assessed value of its real estate; that said State board of equalization, so called, knowingly and designedly did fix a much higher per cent. of value and assessment for taxation upon the capital stock and shares of your orator than upon the capital and shares of other banks organized and existing under the laws of the State of Ohio, and which they pretended to equalize, a much higher rate and per cent. than was assessed upon other moneyed capital in the hands of citizens of the State of Ohio and much higher than that fixed upon other moneyed capital in the hands of such citizens in the said county of Cuyahoga and city of Cleveland. That about four-fifths of the taxes assessed in said city of Cleveland and upon the stockholders of your orator upon their shares, in said bank, are assessed and paid for the purposes and are of the said city of Cleveland, and about one-tenth for the purposes and are of the said county of Cuyahoga, and only about one-tenth for the purposes and are of the State of Ohio; that said State board of equalization did not equalize the value of said shares with the value of shares in other banks or with the value of other moneyed capital in the hands of citizens of the State of
217 Ohio, county and city, but designedly and intentionally, placed a much higher value thereon, which valuation so purposely equalized and determined by said State board of equalization, the auditor of said State did certify to the said auditor of Cuyahoga county, which valuation so certified the said county auditor did enter upon the tax duplicate of said county for the year 1885; that, afterwards, said county auditor did enter upon the tax duplicate of said county for the year 1885 against your orator, a tax on such valuation of such shares for the year 1885 amounting in the aggregate to $12,890.15, and upon a valuation as aforesaid of such shares of $495,774.76, exclusive of the assessed value of its real estate; that a large part of the capital stock of your orator is invested in the obligations and securities of the United States, and in the lawful money thereof, and that said tax so levied and assessed, was and is, in violation of law, unauthorized and void. That the said tax was levied on a valuation 11.455 per cent. higher than that fixed by the county auditor aforesaid and about four-fifths thereof for the city of Cleveland, to answer the various purposes of that municipal body; that said duplicate as required by law, with the said taxes charged thereon, has been by said county auditor delivered to said Henry N. Whitbeck, treasurer of said county of Cuyahoga, to be by him collected from your orator by distraint, attachment or other legal proceedings as provided in said statutes, who will immediately

proceed to enforce the collection thereof, either by sacrifice of such shares by enforcing the lien thereon created by said statutes, or otherwise, unless restrained by the injunction of this honorable court. And your orator further represents and shows unto your honors that in and by the second section of the twelfth article of the constitution of said State it is provided that "laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, and also all real and personal property according to its true value in money," and in and by the third section of the same article that "all property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals," and by the fourth section of the thirteenth article, it is further provided that "the property of corporations now existing or hereafter created shall forever be subject to taxation the same as the property of individuals." And in and by the act of Congress under which your orator is incorporated the right of the State to tax any owner of its shares is made
218 subject to this condition: "That the taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such State." Your orator further avers that by section 2730 of the Revised Statutes of Ohio it is enacted that "the term 'credits' shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due to, or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this State, other than such as are held to be money as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money), over and above the sum of legal, *bona fide* debts owing by such person;" and by section 2736 of the Revised Statutes of Ohio, it is provided that every person required to list property for taxation shall deliver to the assessor annually a statement of all personal property, money and "credits" and other property in his possession or under his control on the day preceding the second Monday of April of that year, which he is required to list for taxation; and by section 2737 it is provided that such statement, among other things, shall truly set forth the amount of "credits" possessed by such person as that term is by the above-recited statute defined. Your orator says that a large amount of moneyed capital in the hands of individuals invested in promissory notes and other obligations and credits is by the aforesaid provision allowing deduction of legal, *bona fide* debts to be made therefrom, expressly exempted from taxation, thereby making an unjust and unlawful discrimination against moneyed capital invested in national bank shares, as to which no exemption or deduction is provided for by the laws of the State, which discrimination in is direct violation of the restrictions of said section 5219 of the Revised Statutes of the United States. Your orator further avers that the following-named stockholders of said bank were, on the said day next preceding the second Monday of April, A. D. 1885, the owners and thence until now have owned and still continue to own, the number of shares of the stock of said bank set op-

posite their respective names, viz: T. P. Handy, 600; S. Chamberlain, 500; R. L. Chamberlain, 100; W. W. Bingham, 150; S. L. Mather, 400; James Barnett, 400; Amos Townsend, 240; L. A. Murfry, 500; C. L. Murfry, 50; E. R. Perkins, 530; James Parmelee, 70. And at the day last named and at the time the cashier of said banking association made return to the auditor of Cuyahoga county, Ohio, of the names and residences of the
219 shareholders of said association with the number and par value of the shares of the capital stock of said banking association for the year 1885, to wit, between the first and second Mondays of May, of said year, each of said above-named stockholders was indebted and owing to others of legal, *bona fide* debts a sum in excess of the credits from which under the laws of Ohio he was entitled to deduct said debts, to an amount equal to the value of said shares except said E. R Perkins and said C. L. Murfry, the excess of whose debts over the credits which by the laws of Ohio they were entitled to deduct from their credits equal- in the case of said Perkins the value of 320 of his said shares and in the case of said Murfry the value of 25 of his said shares, which said excess of said debts over credits as aforesaid, should be deducted from the assessed value of said shares, so owned by him, and by reason of the facts above stated said shares of said stock should not have been placed on the tax duplicate, and no tax should have been assessed thereon. And your orator alleges that neither of the above-named shareholders listed any of said shares for taxation nor did either authorize any one to list them for him. That at the time of the return and statement to the auditor of Cuyahoga county as above stated neither said banks or said cashier had knowledge of the fact that the shareholders above named were indebted as aforesaid and no opportunity was given them, or either of them, nor was any provision therefor made by law, to deduct from the value of said shares so owned by them the amount of said indebtedness, or to demand the right so to do, or demand that the same should be done, but your orator alleges that on the 17th day of December, A. D. 1885, and before the tax assessed on said shares became due and payable each of said shareholders, and your orator, made due and legal showing and proof to said auditor of Cuyahoga county, when said return was made and to said respondent of the existence of the said indebtedness and demanded that the same should be deducted from the assessed value of the shares owned by him and returned by your orator, but both the respondent and said auditor refused to make said deductions and insisted that the whole of said shares as then assessed should remain upon the tax duplicate and insisted upon the payment of the whole of the tax as assessed thereon. And your orator insists that by reason of the premises above set forth, there should be deducted from the shares of the capital stock owned by said shareholders above named, and now standing on the tax duplicate of said county
220 $285,600 par value of the shares of said stock, in all the sum of $141,543.48 according to the assessed value thereof. And your orator further represents that on the 17th day of December, A. D. 1885, on behalf of the shareholders owning said shares, it duly

tendered to said treasurer and offered to pay for the taxes due December 20th, 1885, on said shares the sum of $3,942.59 and is still ready and willing to pay the same, as well as the other half, on the same basis of valuation in manner and at the times provided by law for the payment of taxes, to wit, on or before the 10th, of June, A. D. 1886, if the treasurer will receive it or the court so orders; but said treasurer has so far refused to receive said payment unless your orator would also pay the whole amount of said tax as it stands on the duplicate.

Your orator avers and insists that the taxes so levied and assessed against it on account of its said shares of stock are unjust, illegal and void for the following among other reasons: 1st. That said tax is levied and assessed against your orator directly, and is in violation of the act of Congress under which your orator is incorporated. 2nd. That the laws of Ohio authorize and permit the owner of credits to deduct therefrom all debts owing by him and requires him to list for taxation only the excess of credits over his indebtedness, and that such is the uniform practice throughout the State, and that under the laws of the same State the owner of capital stock of your orator is denied the right to deduct therefrom his indebtedness, but is required to list for taxation the whole number of shares owned by him and not simply the excess of the value of said shares over his indebtedness, and your orator insists that such discrimination results in the taxation of your orator's stock at a much greater rat than is assessed upon other moneyed capital in the hands of individual citizens of Ohio. 3rd. Their property in this corporation is not valued and taxed the same as the property of individuals, and the burden of taxation upon it is very much greater, nor has any equality been preserved in the valuation of the shares for taxation as compared with other property in the locality where your orator is established; on the contrary, the valuation in proportion to the value is fully twice as much as that fixed on other property, while the rate of levy is the same. 4th. The proceedings of said State board of equalization were irregular, illegal and of no binding obligation, for, while the said act proposes to give authority to examine and equalize the value of such shares as fixed by the county auditor and as reported by him to the State auditor, yet the said board did in fact examine and equalize as aforesaid, and not otherwise, the values of such shares fixed by the county auditor and determined by him, to the State board of equalization; which value, so fixed and returned, the said State board were not authorized by law to examine, equalize or in any manner meddle with. While said act proposes to give authority to hear complaints and to equalize the value of said shares as fixed by the county auditor, not increasing the aggregate more than 20 per cent. of such valuation, yet your orator avers that said board has proceeded without any complaint made against the valuation made by said auditor and without any notice to your orator, or the other national banks located in said city and county, or the shareholders thereof, to increase arbitrarily the valuation for taxation more than five hundred thousand dollars, upon your orator, and

221

upon other national banks of the said city, and upon the shareholders thereof, without any hearing or any opportunity for hearing, as is fairly required by said act. 5th. That the taxation of the shares of your orator's stock, as aforesaid, is at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of Ohio. 6th. The necessary effect of the proceedings had in the assessment and levy of the taxes standing against your orator and the shares thereof owned by its said shareholders, has been to deprive your orator and such shareholders, both in the manner of valuation and equalization, of all benefit of the constitution and general laws of the State, by which only uniformity in the burdens of taxation upon all description of property could be secured—to take from them the security afforded by the limitations of the acts of Congress and to impose upon them such excessive exactions as to make the franchises granted by said act comparatively valueless. And your orator further represents that if the shares of said stockholders are permitted to be sold under the lien created on them by section 2839 of the said Revised Statutes of Ohio, or otherwise, irreparable injury would not only be done to each of the shareholders, but also to your orator; and it would thereby be subjected to great loss of standing and credit and other injuries, for the redress of which the law affords no remedies, and the franchises with which your orator is invested by the act of Congress aforesaid, would not only be greatly impaired in value, but if such illegal exactions are to continue and be persisted in, would be rendered nearly useless; that the disability imposed upon your orator to make transfers or pay dividends of or upon shares upon which such illegal tax remains unpaid would damage all the
222 ordinary business of your orator and introduce confusion and uncertainty into its transactions, and the consequent loss of public confidence upon which its success depends; or, if your orator should pay such illegal tax and attempt to deduct the amount from the dividends or other funds of the shareholders in its hands—which many of its shareholders have already prohibited its doing—it would be subjected to a great multiplicity of suits, brought by its separate shareholders for so doing; and, in any event, a great number of suits would be rendered necessary to adjust the rights of all the parties, and your orator would be subjected to great expense and irreparable injury thereby. Inasmuch, therefore, as your orator is remediless by the strict rules of the common law, and relievable only in equity, it prays that said Henry N. Whitbeck, treasurer of said Cuyahoga county, may be made party defendant to this bill of complaint; that the writ of subpœna may issue against him, and that he may answer the premises; that your honors will grant unto your orator your writ of injunction strictly restraining and enjoining during the pendency of this suit the said Henry N. Whitbeck, treasurer of said Cuyahoga county, as aforesaid, from collecting or attempting to collect from your orator, or said individual stockholders, by distraint or otherwise, any of the said taxes as the same stand charged on the said duplicate, and that upon the final hearing thereof, the said tax may be declared and decreed wholly ille-

gal and void; or, if your honor should consider your orator not entitled to the relief aforesaid, that the said respondent may be decreed to receive in full of said taxes the sum so tendered by your orator, and be perpetually enjoined from collecting or attempting to collect the balance of said taxes so illegally assessed, and for such other and further relief in the premises as equity and good conscience require.

BOYNTON & HALL,
*Solicitors for Complainant.*

UNITED STATES OF AMERICA, }
*Northern District of Ohio.* }

Be it remembered that on this 17th day of December, 1885, personally came before me C. L. Murfry, who, being by me duly sworn, deposes and says that he is the cashier of the complainant in the foregoing bill of complaint; that he has heard the same read and knows the contents thereof; that all the allegations and statements therein contained as derived from the information of others,
223 he believes to be true, and all other allegations and statements therein made are true in substance and in fact.

C. L. MURFRY, *Cr.*

Sworn to before me and signed in my presence, the 17th day of December, 1885.

NORTON T. HORR,
*Notary Public in and for Cuyahoga County, State of Ohio.* [SEAL.]

*Subpœna.*

And afterwards, to wit, on the 18th day of December, A. D. 1885, the following subpœna was filed in this cause, in said court, viz:

UNITED STATES OF AMERICA, }
*Northern District of Ohio, Eastern Division,* } *ss:*

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon Henry N. Whitbeck, treasurer of Cuyahoga county, Ohio, if he may be found in your district, to appear in the circuit court of the United States, within and for the district aforesaid, at Cleveland, on the first Monday in March next, to answer a certain bill in chancery filed and exhibited in the said court against him by the Mercantile National Bank of Cleveland, Ohio. Whereof he is not to fail under the penalty of the law, thence ensuing, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of United States, this 17th day of December, A. D. 1885, and in the 110th year of the Independence of the United States of America.

A. J. RICKS, *Clerk,*
By O. C. BEATTY,
*Deputy Clerk.* [SEAL.]

*Memorandum.*

The said defendant is required to enter his appearance in the suit in the clerk's office of said court on or before the first Monday of February, 1886, otherwise the said bill may be taken *pro confesso*.

A. J. RICKS, *Clerk.*

224 NORTHERN DISTRICT OF OHIO, *ss:*

On the 18th day of December, 1885, I made due service of this writ, by delivering a true and duly certified copy thereof to H. N. Whitbeck, treasurer of Cuyahoga county.

W. T. GOODSPEED,
*U. S. Marshal.*

(Indorsed:) Returnable February 1st, 1886. Rule day for appearance, February 1st, 1886, rule day for answer, March 1st, 1886. Returned and filed December 18th, 1885. A. J. Ricks, clerk.

And afterwards, to wit, on the 18th day of December, A. D. 1885, being a day of the October term, A. D. 1885, of said court, the following order was filed in this cause in said court, viz:

*Restraining Order.*

This day came the complainant, and came also the defendant, by counsel, and the motion for an injunction as prayed for came on for hearing, and the court being fully advised in the premises, do order that the defendant be and he is hereby enjoined and restrained prior to the final hearing and further order of this court in the premises from collecting the excessive taxes and assessments complained of in the complainant's bill, by distraint or otherwise, and from serving notice as such treasurer forbidding the officers of said bank from making transfers of the shares or payment of the dividends or other funds belonging to said shareholders. It is further ordered that said complainant pay to said defendant as treasurer the amount of taxes admitted by said bill to be due, if said treasurer will receive the same, and in case said treasurer receives the same his receipt therefor shall be without prejudice to his right to test the validity of the taxes in dispute in said case. It is further ordered that said complainant file herein its bond in the sum of $2,000, with surety approved by the clerk of said court, conditioned according to law, to indemnify defendant for any damage that may be awarded by the court in the premises against said complainant.

And afterwards, to wit, on Thursday, the 30th day of December being a day of the October term, A. D. 1885, of said court, the following order was entered in this cause in this court, viz:

225 *Order.*

It being shown to the court that the first name of said defendant is Horatio and not Henry, on motion of said plaintiff it is ordered

that the name Henry wherever it appears in the pleadings, process or return thereof or orders in said case, be changed to Horatio, and that hereafter said case proceed against said respondent as Horatio N. Whitbeck, instead of Henry N. Whitbeck.

And afterwards, to wit, on the 15th day of March, being a day of the February term, A. D. 1886, of said court, the following order was entered in this cause in said court, viz.:

*Leave to File Demurrer.*

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,
*vs.*
HORATIO N. WHITBECK, Treasurer of Cuyahoga County, Ohio.

In this cause leave is given the respondent to file a demurrer to complainant's bill instanter.

And afterwards, to wit, on the 15th day of March, A. D. 1886, the following demurrer was filed in this cause in said court, viz.:

*Demurrer.*

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Ohio, Complainant,
*vs.*
HORATIO N. WHITBECK, Treasurer of Cuyahoga County, Ohio, Defendant.
Demurrer.

To the judges of the circuit court of the United States for the northern district of Ohio, eastern division:

The demurrer of Horatio N. Whitbeck, treasurer of Cuyahoga county, defendant, to the bill of complaint of The Mercantile
226 National Bank of Cleveland, Ohio, complainant.

This defendant, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true, demurs thereto and for cause of demurrer says:

1. That this court ought not to take cognizance of or sustain the action aforesaid, because he says that said court has no jurisdiction thereof as it appears from said bill of complaint that said complainant is established and doing business in the city of Cleveland, in the county of Cuyahoga and State of Ohio.

2. And for further cause of demurrer he says that it appears by the complainant's own showing in its said bill of complaint that the said complainant is not entitled to the relief prayed for in its said bill against this defendant, and that the facts set forth in the said bill of complaint do not make such a case as entitle said complain-

ant to any relief whatever against the defendant. Wherefore, and for divers other causes of demurrer appearing in said bill of complaint, this defendant demurs to the said bill and to all matters and things therein contained, and prays the judgment of the court whether he shall be compelled to make any further or other answer to the said bill, and he prays to be hence dismissed with his reasonable costs in this behalf sustained.

We certify that in our opinion the foregoing demurrer of Horatio N. Whitbeck, treasurer of Cuyahoga county, Ohio, defendant, to the bill of complaint of The Mercantile National Bank of Cleveland, Ohio, complainant, is well founded in law and proper to be filed in the above case.

HADDEN, DISSETTE, COLLISTER,
JAMES LAWRENCE,
CLARENCE BROWN,
*Solicitors for Respondent.*

UNITED STATES OF AMERICA, }
*Northern District of Ohio, Eastern Division,* } *ss:*

Horatio N. Whitbeck, being duly sworn, deposes and says that he has read the foregoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

H. N. WHITBECK.

227 Sworn to before me by the said Horatio N. Whitbeck, and by him signed in my presence, this 15th day of March, 1886.

A. E. SHEARER,
*Deputy Clerk Common Pleas Court,*
*Cuyahoga County, Ohio.* [SEAL.]

And afterwards, to wit, on Thursday, the 25th day of March, being a day of the February term, A. D. 1886, of said court, the following proceedings were had in this cause in said court, viz:

*Demurrer Overruled.*

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, }
*vs.*
HORATIO N. WHITBECK, Treasurer of Cuyahoga County, Ohio. }

This cause came on this day to be heard upon the demurrer of Horatio N. Whitbeck, treasurer, to the complainant's bill of complaint herein, and the same was *agreed* by counsel, and thereupon, upon consideration thereof, it is ordered that the same be overruled and leave is given the respondent to file his answer by April 15th, 1886.

And afterwards, to wit, on the 22nd day of April, A. D. 1886, the following answer was filed in this cause in said court, viz:

*Answer.*

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Ohio, Complainant,
vs.
HORATIO N. WHITBECK, Treasurer of Cuyahoga County, Ohio, Defendant.
} Answer.

To the judges of the circuit court of the United States for the northern district of Ohio, eastern division:

228 The answer of Horatio N. Whitbeck, treas. of Cuyahoga Co., Ohio, defendant, to the bill of complaint of The Mercantile National Bank of Cleveland, Ohio, complainant.

This defendant reserving to himself all rights of exception to the said bill of complaint, for answer thereunto, admits that he is the treasurer of Cuyahoga county, Ohio, and is a citizen of Ohio, and of said national banking association, incorporated under the act of Congress mentioned in said complaint, with the amendments thereto, and is established and doing business in the city of Cleveland, in said northern district of Ohio; that said complainant has a capital stock of $1,000,000.00, divided into 10,000 shares of one hundred dollars each, all of which is paid up and certificates for the shares are outstanding. That the cashier of said complainant reported in duplicate to the auditor of said county the resources and liabilities of said banking association at the close of business on the Wednesday next preceding the second Monday in May, 1885, together with a statement of the names and residences of the stockholders therein, and the number of shares held by each, and the par value of each share, as required by section 2765 of the Revised Statutes of Ohio. That the real estate included in said return is otherwise and separately assessed and charged on the tax duplicate of said county. That the auditor of said county thereupon proceeded to fix the total value of the shares of said bank at $444,820.00, exclusive of the assessed value of its real estate, and made out and transmitted to the annual State board for the equalization of the shares of incorporated banks a copy of the report as made by said cashier, together with the valuation of such shares as so fixed by said county auditor; that the said State board of equalization did examine the return aforesaid made by said cashier to said county auditor and the value of such shares as fixed by said county auditor and the said board (having proceeded in all respects according to law) fixed the aggregate valuation of the shares of said complainant at $495,774.76, exclusive of the assessed value of its real estate. That the auditor of said State did thereupon certify to the auditor of said county the valuation of the shares of said complainant as equalized and determined by said State board of equaliza-

tion, which valuation the said county auditor did enter upon the tax duplicate of said county for the year 1885, and did also enter upon the tax duplicate for the year 1885 a tax on such valuation of such shares for said year amounting in the aggregate to $12,890.15, and upon a valuation as aforesaid of such shares of $495,774.76, exclusive of the assessed value of its real estate. And that afterwards the said duplicate, as required by law, with the said taxes
229 charged thereon, was by said county auditor delivered to the said Horatio N. Whitbeck, treasurer of said county, to be by him collected. This defendant also admits that as said tax duplicate for the year 1885 was originally made up by said county auditor and delivered to the said county treasurer the said tax levied on the total valuation of the shares of said bank, exclusive of the valuation of the said real estate, was entered against the name of said complainant, without specifying therein the names of the several shareholders or the tax assessed on the shares held by each, but giving the separate valuation of each of said shares, exclusive of real estate, as fixed by said State board of equalization. He says that said tax was so entered against the name of said complainant, because, for many years the said complainant, in common with other banks located in said county, had uniformly paid the taxes chargeable against the shares of its stockholders, and it was agreed and understood between said bank and said county auditor that it would continue to pay the same. This defendant does not admit that said duplicate as so made up and delivered was in any respect insufficient or illegal, but, in order to avoid all possible ground for complaint, the said county auditor, since the commencement of this bank action, has corrected the said duplicate, as he is authorized to do by the laws of Ohio, by duly entering thereon the names of the several shareholders of said complainant, the number and valuation of the shares held by each and the amount of the tax chargeable thereon; and this defendant disclaims any purpose of enforcing the collection of said taxes in any other manner than as authorized by law. And further answering the said bill of complaint, this defendant denies that he or any others whose acts he is carrying into effect, is violating or has violated any rights of the shareholders of said complainant, either in respect to the taxation of their shares of stock in said bank, or otherwise; he denies that the said auditor of Cuyahoga county did meet with or consult with the board of equalization for the city of Cleveland, for the purpose of more accurately determining and fixing the value of said shares, or that the valuation by said county auditor reported to the State board of equalization was fixed and determined upon by said county auditor with the assistance and approval of said city board of equalization, or that it is by law the duty of said city board of equalization to value and equalize for taxation all moneyed capital and personal property of every kind in the hands of individual citizens of the State of Ohio,
230 resident in said city, except only the capital, assets and shares of incorporated banks. He denies that said county auditor placed the value upon said shares which was in fact, or was known by him to be in excess of the value fixed in said county on other

moneyed capital in the hands of individual citizens of the State of Ohio, and of said city and county.

He denies that said State board of equalization did not examine any other returns made by said county auditor except the return made by the cashier of said complainant to said county auditor, and the value of such shares as fixed by said county auditor, or that said State board of equalization knowingly or designedly did fix a higher per cent. of value and assessment for taxation upon the capital stock and shares of said complainant than upon the capital and shares of other banks organized and existing under the laws of the State of Ohio, or a higher rate per cent., than was assessed upon other moneyed capital in the hands of citizens of the State of Ohio, or higher than that fixed upon other moneyed capital in the hands of such citizens in the said county of Cuyahoga, city of Cleveland.

He denies that said State board of equalization did not equalize the value of said shares with the value of other moneyed capital in the hands of citizens of the State of Ohio, county and city aforesaid, or that said State board of equalization designedly or intentionally placed a higher valuation thereon, or that the tax levied and assessed in the valuation of said shares was or is in violation of law, unauthorized or void. Said defendant further denies that the levying and assessing of said tax against said complainant directly is in violation of the act of Congress of the United States under which said complainant is incorporated; he denies that the tax, the collection of which said complainant by its said bill seeks to enjoin is in violation of any act of Congress of the United States or is levied or assessed in a manner which is in violation of any act of Congress of the United States. He denies that the shares of the capital stock of said complainant, the property of its shareholders, are not taxed by any law prescribing any uniform rule for the valuation of the property of said shareholders and the levying of taxes thereon, as provided by the constitution of the State of Ohio; he denies that the acts of the General Assembly of the State of Ohio under and by virtue of which the taxes in said State are or purport to be assessed, do not have a uniform operation throughout said State as required by the constitution of the said State.

231 He denies that the property of the owners and holders of the shares of the capital stock of said complainant in said complainant corporation is not valued and taxed the same as the property of individuals, or that the burden of taxation upon the shares of said stockholders in said corporations is very much or any greater than upon the property of individuals; he denies that equality has not been preserved in the valuation of said shares for taxation as compared with other property in the locality where said complainant is established; he denies that the valuation of said shares in proportion to the value thereof is fully twice as much as, or any more than the valuation fixed upon other property. While admitting that the constitution and laws of Ohio contain provisions in reference to taxation substantially as quoted in said bill of complaint this defendant says that all the provisions of said constitution and laws upon that subject should be considered in order to deter

mine the force and effect of those quoted, and he denies that a large amount of moneyed capital in the hands of individuals invested in promissory notes and other obligations and credits is expressly exempted from taxation in said State. He denies that any of the shareholders of said banking association, at the times named in said bill of complaint were indebted or owing to others of *bona fide* debts, a sum in excess of the credits from which under the laws of Ohio he was entitled to deduct said debts, to an amount equal to the value of his said shares or any part thereof. He denies that either of said shareholders was then indebted in any sum whatever, or that, even if any of them was so indebted as claimed in said bill of complaint, he is thereby entitled to deduct the excess of such indebtedness over his credits from the assessed value of his said shares, or that for any reason said shares of stock should not have been placed on the tax duplicate and no tax assessed thereon. This defendant denies the averment in said petition that neither of said shareholders authorized any one to list his said shares for him. He denies that it was necessary for said shareholders so to do.

He denies that at the time of the return and the statement by the cashier of said bank association to the auditor of Cuyahoga county, neither said bank nor its cashier had knowledge of the indebtedness of said shareholders, if any such indebtedness existed. He denies that on the 17th day of December, 1885, or at any time said complainant or any of said shareholders made due and legal showing and proof to the auditor of said county or to this defendant of
232 the existence of said alleged indebtedness, or demanded that the same should be deducted from the assessed value of the shares owned by such shareholders and returned by said complainant. He denies that any sum whatever should be deducted from the valuation of the shares of the capital stock owned by said shareholders named in said bill of complaint.

This defendant further denies that the taxes so levied and assessed on the shares of said complainant's stock are, for the reasons alleged in said bill of complaint, or for any reason, unjust, illegal or void. He denies that the laws of Ohio authorize and permit the owner of credits to deduct therefrom all debts owing by him, or that such is the uniform practice throughout the State. He denies that the proceedings of said State board of equalization were in any respect irregular or illegal or were for any reason of no binding obligation, or that said State board of equalization proceeded arbitrarily to increase the valuations for taxation upon said complainant, and upon other national banks of the said city, and upon the shareholders thereof without any opportunity for hearing. He denies that the taxation of the shares of said complainant's stock is at a much or any greater rate than is assessed upon other moneyed capital in the hands of individual citizens of said State of Ohio. He denies that the necessary effect of the proceedings had in the assessment and levy of the taxes standing against said complainant, and the shares thereof owned by its said shareholders, has been to deprive said complainant or said shareholders either in the matter of valuation or equalization of any of the benefits of the constitution or gen-

eral laws of said State of Ohio, or to take from complainant or said shareholders any security afforded them by the limitation of said act of Congress, or to impose upon said complainant or said shareholders any undue or excessive exactions or any such exactions as to make the franchises granted by said act of Congress comparatively valueless.

He denies that irreparable injury would be done either to complainant or to said shareholders or any of them by the enforcement of the lien created on said shares by section 2829 of the Revised Statutes of Ohio; or, that said complainant would thereby be subjected to great loss of standing or credit, or subjected to any other injuries for the redress of which the law affords no remedies, or that the franchises of said complainant granted by said act of Congress would be greatly impaired or rendered nearly useless or that the disability imposed upon complainant to make transfers or pay
233 dividends of, or upon said shares, upon which said taxes remains unpaid, would damage all the ordinary business of complainant, or introduce confusion or uncertainty into its transactions, or incur any loss of public confidence; or that if said complainant should pay the taxes for those of its shareholders whom by law it may pay for and deduct the amount from their dividends or other funds of said shareholders in its hands, it would be subjected legally to any suit which might be brought against it by said shareholders or any of them, for so doing; or that said complainant would be subjected to great expense or irreparable injury by so doing, or that a great number of suits would be rendered necessary to adjust the rights of all the parties.

And this defendant further denies each and every allegation in said bill of complaint not hereinbefore admitted or expressly denied. To the contrary of all of which this defendant avers that by and under the act of Congress of the United States, in said bill mentioned, the shares of stock of said complainant are personal property and in and by said act it is permitted that the legislature of each State might determine and direct the manner and place of taxing all the shares of the national banking associations organized and established thereunder, located within such State, subject only to two restrictions, viz: 1st, that the taxation thereon should not be at a greater — than should be asssessed upon other moneyed capital in the hands of individual citizens of such State and 2nd, that the shares owned by any non-resident of the State should be taxed in the city or town in which such association should be located and established. And this defendant says that the taxes mentioned in said complainant's bill, assessed upon the shares of said complainant is not taxed at a greater rate than is imposed by the State of Ohio and the laws thereof, upon other moneyed capital in the hands of the individual citizens of said State, and individual citizens of said county, city and of said State, and that the shares of the non-resident shareholders are taxed in said city of Cleveland where said complainant's bank is established.

And this defendant further says that said annual State board for the equalization of the shares of incorporated banks, consisting of

the governor, auditor of State and attorney general of said State, did meet on the third Tuesday of June, A. D. 1885, at the office of said auditor of State at Columbus, and having before them the statement and returns of the complainant's cashier and the valuation of the complainant's shares fixed by said county auditor, with like
234 returns and valuation of all the incorporated banks within the State of Ohio, proceeded to consider at the same, and, having heard all complaints, equalized the value of the shares of all the incorporated banks within said State as determined upon and reported by the county auditor to said board and to said auditor of State, and thereupon made an equalization of the valuation of all the shares of all the incorporated banks within the State of Ohio according to the rules prescribed by the laws of said State for valuing and equalizing values of real and personal property. That in acting upon the shares of said complainant for the purpose of equalizing their value for taxation aforesaid, said annual State board of equalization was governed by the same rules and adopted and used the same methods as those by which it was governed and which it used in equalizing the shares of all other incorporated banks for taxation, and the same as governed and were used by all other equalizing boards and all other officers of said State, county and city in the valuing and equalizing of all other property for taxation. That neither the said complainant or its cashier or other officers, nor any of its shareholders appeared before said board or presented to it any complaints or any statements of the several alleged matters and things now set forth in said bill of complaint. That it appearing from said cashier's return that the capital stock of complainant, taken together with its surplus and undivided profits, amounted to $1,042,730.41, and that said county auditor acting upon said return had fixed the value of all the shares of the said complainant for taxation at $444,820 (after having deducted from said value, the value of said real estate) said annual State board of equalization, governed by the rules and adopting and using the methods aforesaid, and acting wholly within the limits and discretion allowed them by the statute of said State, increased said valuation so as aforesaid, fixed by said county auditor, by adding thereto $50,954.76, making said valuation of all of said shares $495,774.76 and each of said shares thereof (the par value of which is $100) $49.57 which sum is not in excess of the true value in money of said shares, but on the contrary, is much less than the true value in money thereof.

And said board having equalized and fixed the valuation of said shares of complainant, said auditor of State thereupon transmitted to the auditor of Cuyahoga county the valuation of the shares of said complainant, as aforesaid, determined and fixed by said State board. And the said county auditor of said Cuyahoga county, thereupon, as he was required by law, did place upon the duplicate
235 of said county, with all the other taxable property in said county, the said shares of said complainant at the valuation so fixed upon and determined by said State board of equalization, and assessed upon the same merely the same rate as was assessed

upon all other property upon the county duplicate in the city of Cleveland for the said year of 1885 at the place where said complainant is located and doing business, and being the same rate as that assessed upon the moneyed capital of the individual citizen of said State, resident in said city of Cleveland. And this is the same tax mentioned and described in the complainant's bill. And this defendant further says that, under the laws of Ohio, he as the treasurer of said county, has no duty or authority in respect to the assessment or appraisement of property for taxation; that the auditor of said county has no further duty or authority in respect to the assessment or appraisement for taxation of the shares of incorporated banks after he has fixed the total value of such shares and has made out and transmitted to the annual State board for the equalization of the shares of incorporated banks a copy of the report made by the cashier of the several banks, together with the valuation of such shares as fixed by said auditor in pursuance of section 2766 of the Revised Statutes of Ohio; that if the shareholders of said complainant were entitled to any deduction from the value of their said shares on account of their individual indebtedness (which this defendant does not admit), due showing and demand therefor should have been made to said auditor of said county before he fixed the value of said shares, and transmitted the same to the auditor of State as aforesaid; but that no such showing or demand was made to said county auditor, nor was any showing or demand, or any complaint in respect thereto made to said State board of equalization. Defendant says that at the time when said complainant claims that its said shareholders made demand for the deduction of their alleged indebtedness from the valuation of their said shares, the entire process of the appraisement and equalization of the valuation of such shares had long since been completed, and neither this defendant nor said county auditor had then authority to allow any deduction whatever from the valuation of said shares as the same had been fixed and determined.

And the said defendant further answering denies that the said complainant is entitled to the relief, or any part thereof in
236 the said complaint demanded, and he prays to be hence dismissed with his reasonable costs and charges in this behalf sustained.

HADDEN, DISSETTE & COLLISTER,
JAMES LAWRENCE,
CLARENCE BROWN,
*Solicitors for Defendant.*

UNITED STATES OF AMERICA, }
*Northern District of Ohio,* } ss:

H. N. Whitbeck being duly sworn, deposes and says that he is the defendant in the foregoing answer; that he has read the same and knows the contents thereof and that the same is true, of his own knowledge, except as to the matters and things therein con-

tained on information and belief, and as to such matters he verily believes them to be true.

H. N. WHITBECK.

Sworn to before me by the said H. N. Whitbeck, and by him subscribed in my presence this 21st day of April, A. D. 1886.

L. E. MEACHAM,
[SEAL.] *Deputy Clerk, Common Pleas Court, Cuyahoga County, Ohio.*

And afterwards, to wit, on the 3d day of May, A. D. 1886, the following replication was filed in this cause in said court, viz:

Circuit Court of United States, Northern District of Ohio.

THE MERCANTILE NATIONAL BANK OF Cleveland, Ohio, *vs.* HORATIO N. WHITBECK, Treasurer, etc. } In Equity. No. 4411.

*Replication.*

The replication of the above-named complainant to the answer of the above-named defendant.

The repliant saving and reserving to itself now and at all times hereafter all and all manner of benefits and advantage of exception which may be had or taken to the manifold insufficiencies of said answer for replication thereunto says, that it will aver, main-
237 tain and prove the bill of complaint to be true, certain, and sufficient in law, to be answered unto; and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this that any other matter or thing whatever in the said answer contained, material and effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied is true; all which matters and things this repliant will be ready to aver, maintain and prove, as this honorable court shall direct, and humbly prays as in and by the said bill it has already prayed.

BOYNTON & HALE,
*Solicitors for Complainants.*

*Order Appointing Special Master.*

And afterwards, to wit, on Saturday the 6th day of November a day of the October term, A. D. 1886, of said court the following order was entered in this cause in said court, viz:

In this cause it is ordered that A. J. Ricks, because he is experienced in matters of accounting be appointed a special master to examine the evidence and record now on file and to report who, if any of the shareholders of the complainant, on the day preceding

the second Monday of October, 1885, had *bona fide* indebtedness which should have been deducted from the valuation of the shares.

And afterwards, to wit, on the 15th day of November, A. D. 1886, the following affidavit was filed in this cause in said court, viz:

*Affidavit.*

STATE OF OHIO, }
*Cuyahoga County,* } ss:

T. P. Handy being first duly sworn on his oath, says that the Mercantile national bank is a corporation organized and doing business at Cleveland, Ohio, under the act of Congress known as "national bank act," and the act amendatory thereto and its shareholders are subject to the provisions of and entitled to the benefits conferred by section 5219 of the Revised Statutes of the United
238 States; that on the day next preceding the second Monday of April, A. D. 1885, and at the time the cashier of said bank made out and returned to the auditor of Cuyahoga county, Ohio, a statement of the names and residences of the stockholders of said bank with the number of shares of the capital stock owned and held by each and the par value thereof for the year 1885, to wit, between the first and second Mondays in May, A. D. 1885, as required by section 2765 of the Revised Statutes of Ohio, affiant was an owner of 600 of said shares of the par value of $100 per share, and the same were returned, as belonging to him, by said cashier and from said day next preceding the second Monday of April, 1885, he has continued to own and now owns said number of shares of stock in said bank.

Affiant further says that he has never been required by any authority to list said shares for taxation; that when the same were required to be and were so returned for taxation by said cashier, and also on the day next preceding the second Monday of April, 1885, affiant was indebted and owing to others in legal, *bona fide* debts the sum of $80,000 over and above any and all credits which by law he was entitled to deduct therefrom, and from which excess of debts over credits should be deducted said 600 shares of said stock. Affiant says that in making up the sum of said debts owing by him in excess of the credits deducted therefrom, he has not included any claim or obligation which section 2730 of the Revised Statutes of Ohio requires to be rejected, which he is ready to make, if required or permitted by an exhibit of such indebtedness. Affiant further says that the tax and assessment upon said shares were made thereon in excess of the amount for which the same were assessable, without his authority or consent, and the same were listed by said cashier in the manner aforesaid without any authority from the affiant for so doing and in sole compliance with the statute, and affiant has had no opportunity or way provided to secure said deduction of credits from said shares other than to seek said deduction from the value of the shares since they were carried on the duplicate.

T. P. HANDY.

Sworn to before me and in my presence subscribed this 16th day of December, A. D. 1885.

NORTON T. HORR,
*Notary Public.*

239 And afterwards, to wit, on the 8th day of November, A. D. 1886, the following master's report was filed in this cause in said court, viz.:

*Report of Special Master.*

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,
*vs.*
H. N. WHITBECK, Treasurer.
} In Equity. No. —.

To the honorable the judges of the circuit court:

By an order entered in this case the undersigned was appointed a special master to ascertain and report from the testimony and record who, if any of the shareholders of the complainant on the day preceding the second Monday of April, 1885, had *bona, fide* indebtedness which should have been deducted from the valuation of the shares of the capital stock of complainant bank. The master reports that having examined the evidence and heard the claim of counsel, he finds and reports that all the shareholders are entitled to the deductions as charged in the bill except the following, who should be taxed for the amount stated, viz.: E. R. Perkins had credit subject to taxation above his indebtedness on the day named to the sum of $4,374.40; C. L. Murfry had credits subject to taxation above his indebtedness on the day named to the sum of $724; Robert L. Chamberlain had credits subject to taxation above his indebtedness on the day named to the sum of $4,448; James Parmelee had credits subject to taxation above his indebtedness on the day named to the sum of $3,113.60; James Barnett had credits subject to taxation above his indebtedness on the day named to the sum of $17,792. All of which is respectfully submitted.

A. J. RICKS,
*Special Master.*

240 And afterwards, to wit, on the 8th day of November, being a day of the October term, A. D. 1886, of said court, the following decree was entered in this cause in this said court, viz.:

*Decree.*

THE MERCANTILE NATIONAL BANK
*vs.*
HORATIO N. WHITBECK, Treasurer of Cuyahoga County.
} Decree.

At this term the parties appeared by their solicitors and this cause came on for hearing upon the merits, and the court being fully ad-

vised in the premises from the testimony and exhibits and special master's report adduced in open court, do find all the allegations of the bill to be true, except those allegations which charge that James A. Barnett, Robert L. Chamberlain and James Parmelee were the owners of shares of capital stock of said bank, from which they were entitled to deduct, respectively, an indebtedness of theirs, which allegations the court finds are untrue. And it appearing to the court that the amount admitted to the court in said bill to be due to said respondent, has, pursuant to a former order of this court, been paid by said complainant to said respondent, and by him received. It is therefore ordered, adjudged and decreed that said respondent and his successors in office be forever enjoined from proceeding or attempting to collect or from collecting any part of or portion of said tax or assessment remaining unpaid, except the taxes levied upon the valuation of the shares of capital stock of complainant as fixed by the county auditor owned by said Barnett, Chamberlain and Parmelee amounting to $659.29, the amount of tax hereby enjoined being $3,967.55, and it is therefore ordered, adjudged and decreed that said respondent or his successors in office pay the costs in this suit to be taxed for which it is ordered that execution may issue as upon judgments at law.

And afterwards, to wit, on the — day of ——, A. D. 1886, the following proceedings were had in this cause in said court, viz.:

241 *Decree Vacated.*

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, at the October Term, 1886.

THE MERCANTILE NATIONAL BANK OF CLEVELAND
*vs.*
HORATIO N. WHITBECK, Treasurer of Cuyahoga County, Ohio. } No. 4411.

The above-entitled cause having been submitted to the court, and the decree having been entered in said cause in favor of the complainant therein, and the defendant desiring to present the question arising in said cause to the Supreme Court of the United States to be finally decided, and for that purpose intending to appeal said cause No. 4411; on motion of said defendant it is now ordered by the court that the decree- heretofore entered in the above-entitled causes numbered 4411, 4412, 4413, 4414, 4415, 4416, 4417 and 4418, be, and the same hereby are set aside and vacated to await further orders of the court and that the said several complainants have leave to apply any time hereafter to have said decree re-entered.

Approved:

HOWELL E. JACKSON,
*Circuit Judge.*

And afterwards, to wit, on the 8th day of April, 1887, the decree was rendered in the above-entitled case which decree reads and is in the words and figures following, to wit:

April Term, A. D. 1887, to wit, Friday, April 8th, A. D. 1887.

Present: The Honorable Howell E. Jackson, United States circuit judge, and Honorable Martin Welker, United States district judge.

| | | |
|---|---|---|
| THE MERCANTILE NATIONAL BANK, CLEVELAND, OHIO, *vs.* HORATIO N. WHITBECK, Treasurer of Cuyahoga County, Ohio. | No. 4411. | Chancery. |

242 At this term the parties appeared by their solicitors and this cause came on for hearing upon the merits, and the court being fully advised in the premises from the testimony and exhibits and special master's report adduced in open court, do find *that* all the allegations of the bill to be true, except those allegations which charge that James A. Barnett, Robert L. Chamberlain and James Parmelee were the owners of shares of capital stock of said bank from which they were entitled to deduct, respectively, any indebtedness of theirs, which allegations the court find are untrue. And it appearing to the court that the amount admitted in said bill to be due the said respondents has pursuant to a former order of this court been paid by said complainant to said respondent and by him received. It is therefore ordered, adjudged and decreed that said respondent and his successors in office be forever enjoined from proceeding or attempting to collect or from collecting any part or portion of said tax or assessment remaining unpaid except the tax levied upon the valuation of the shares of the capital stock of complainant as fixed by the county auditor owned by said Barnett, Chamberlain and Parmelee, amounting to $659.20, the amount of tax hereby enjoined being $3,967.55, and it is therefore ordered, adjudged and decreed that said respondent or his successors in office pay costs in this suit to be taxed at $183.47 for which it is ordered that execution may issue as upon judgments at law.

And afterwards, to wit, on the 8th day of April, A. D. 1887, the following bill of exceptions was filed in this cause in said court, viz:

*Bill of Exceptions.*

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

| | |
|---|---|
| THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, Complainant, *vs.* HORATIO N. WHITBECK, Treasurer of Cuyahoga County, Ohio, Defendant. | Bill of Exceptions. |

243 Be it remembered that on the trial of this cause at the October term, A. D. 1886, of the circuit court of the United States for the northern district of Ohio, eastern division, the complainant having offered testimony on its behalf tending to sup-

port the issues on its part and having closed its testimony, the defendant to maintain the issues on his part and for the purpose of showing that throughout the State of Ohio the average rate at which moneyed capital other than the shares of national banks, in the hands of individual citizens of such State, was valued for taxation in the year 1885, exceeding sixty-five (65) per centum of its true value in money, offered in evidence the testimony set forth in the depositions on file herein of the following-named witnesses, to wit, Richard Brown, S. L. Arnold, A. J. Frame, G. W. Rutledge, George W. Temple, George W. McPeck, O. F. Serviss, Charles W. Webster, A. J. High, Asa Jenkins, J. W. Cassingham, B. F. Dum, Frank J. Reivhart, Joseph Staffort, W. R. Baker, George A. Crew, J. Henderson, B. B. Evans, O. F. Randolph, Horatio Pearson, W. M. Bowen, S. J. Werick, John D. Turner, William T. Platt, William Howard, W. B. Gilbert, William F. Simmerall, W. R. Muhleman, C. C. Baker, F. W. Sherer, J. C. Beckett, Daniel Morley, William Wallace, Frank J. Eskar, Augustus Robb, B. F. Maples, John W. Kinsey, J. A. Wagner, R. J. Grigsby, Findley R. McLaughlin, C. Minnick, B. B. Stone, T. E. Beckinpaugh, W. W. Place, George W. Le Fever, J. N. Nunmaker, Aaron Wagner, W. J. Jacobs, Andrew Foflinger, J. W. Brenstio, James F. Lingdfeter, Will C. Fisby, W. W. Ferry, W. S. Batrem, W. T. Will, A. A. Patterson, J. B. Elliott, S. M. Barrick, J. M. Shinn, J. E. Robinson, James Roland and Le Grand A. Olin; whereupon the said complainant objected to the admission of all said testimony, which objection was sustained by the court, and all of said testimony was ruled out, to which ruling of the court and to the refusal to admit said testimony the defendant then and there excepted. And thereupon the defendant offered and proposed to prove by the testimony of said witnesses whose depositions had been duly taken and filed herein, as therein set forth, but the court refused to hear or admit any testimony as to said matters holding in accordance with the opinion of the presiding judge that the only testimony competent or material in this action in respect to the question of discrimination and valuation, is testimony relating to the valuation of moneyed capital in the hands of individual citizens, in the county of Cuyahoga where said complainant bank is located; to which ruling and holding of the court and to the
244 refusal to admit said testimony the defendant then and there excepted, and prayed that his bill of exceptions in that behalf might be allowed, which is accordingly done, and upon his motion ordered to be made a part of the record in this case.

HOWELL E. JACKSON, [SEAL.]
*Circuit Judge.*

M. WELKER, [SEAL.]
*District Judge.*

And afterwards, to wit, on the 8th day of April being a day of the April term, A. D. 1887, of said court the following certificate of division of opinion was filed in this cause in said court, viz:

*Division of Opinion.*

In the United States Circuit Court for the Northern District of Ohio, Eastern Division, October Term, A. D. 1886.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, Complainant,
*vs.*
HORATIO N. WHITBECK, as Treasurer of Cuyahoga County, Ohio, Defendant.
No. 4411.

Certificate of division of opinion.

This cause being heard before the Honorable Howell E. Jackson, circuit judge, and the Honorable Martin Welker, district judge, upon the said complainant's bill of complaint, the answer of the defendant, and the replication of said complainant, and the evidence offered in the case; and it appearing from the testimony and being found by the court: 1. That moneyed capital (other than that invested in shares of national banks) in the hands of individual citizens of the city of Cleveland, and county of Cuyahoga in which the complainant bank is located, was by the rule of valuation fixed by the tax officers of said county and city, valued for taxation, in the year 1885 at sixty (60) per centum only of its true value in money. 2. That the auditor of said Cuyahoga county in accordance with the provisions of section 2766 of the Revised Statutes of Ohio, fixed the total values of the shares of incorporated banks at sixty (60) per cent. of their true value
245 in money in accordance with said rule. 3. That the auditor of said Cuyahoga county for the year 1885 in accordance with the rule and practice thereunder adopted for the valuation of other moneyed capital in the hands of individual citizens of the city and county as aforesaid, fixed the value of the shares of the said complainant for said year at 60 per cent. of its true value in money, and certified and transmitted the same to the annual State board of equalization for incorporated banks. That the State board of equalization increased the value of the shares of the complainant from sixty (60) per cent. of their true value in money, to sixty-five (65) per cent. of their true value in money, which later value was certified to the auditor of said Cuyahoga county and by him placed upon the duplicate for said year and said duplicate delivered to the defendant, the treasurer of said county, for the collection of the taxes thereon; that in the year 1885 the total value of the levy for all purposes in said county and city was twenty-six mills on a dollar's valuation, twenty-three mills and six-tenths of which were devoted to county and city purposes, and but two mills and four-tenths to State levy, for State purposes. 5. That no demand for the deduction from the assessed value of any shares of the complainant, of the amount of the *bona fide* indebtedness of any shareholders, until the 12th day of December, A. D. 1885, a date prior to the commencement of this action, at which time the entire process of the appraisement and

equalization of the value of said shares for taxation had been completed, and the tax duplicate for said year had been delivered in accordance with the law to the treasurer of the said county for the collection of said taxes; but the laws of Ohio make no provision for the deduction of the *bona fide* indebtedness of any shareholder from the shares of his stock, and provide no means by which said deduction can be secured. And the complainant having introduced testimony on its behalf tending to support the issues on its part and having closed its testimony, the defendant to maintain the issues on his part offered the testimony of sundry witnesses tending to show: 1. That throughout the State of Ohio, exclusive of Cuyahoga county and eleven other counties, there is, and in the year 1885, was no rule, practice, custom, understanding, agreement or combination either on the part of the assessors, county auditors, board of equalization, or other taxing officers, whereby moneyed capital (other than the shares of national banks) in the hands of individual citizens of said State, was appraised or valued for taxation for
246 said year at less than its true value in money; that throughout the State of Ohio exclusive of Cuyahoga county, and eleven other counties, moneyed capital (other than the shares of national banks) was in the year 1885 valued for taxation at its true value in money in accordance with the constitution and laws of said State; and, 3, that the percentage of their true value in money at which the shares of national banks throughout the State of Ohio were valued for taxation in the year 1885 was less than the average percentage of true value in money at which other moneyed capital in the hands of individual citizens of such State was valued for taxation in said year. To all of which testimony the said complainant by its counsel objected, and said objection was sustained by the court, and testimony of said witnesses was excluded by the court, to which ruling of the court and to the refusal to admit any testimony, said defendant by his counsel then and there duly excepted. And on the foregoing facts there occurred on the hearing of said cause the following question of law upon which the opinion of the said judges were opposed: 1. Whether the valuation for taxation, as aforesaid of the shares of the complainant by the State board of equalization for the shares of incorporated banks at 65 per cent. of their true value was a discrimination prohibited by the act of Congress. 2. Whether the said testimony offered by said defendant and excluded by the court was admissible for the purposes stated. 3. Whether the rule for the valuation for taxation of other moneyed capital in the hands of individual citizens of said city and county where said complainant bank is located, was the sole measure for the valuation of the shares of national banks located therein, or, might the State board of equalization for the shares of incorporated banks lawfully value such shares at a rate not exceeding the average rate at which other moneyed capital in the hands of individual citizens of said State throughout said State is valued for taxation. 4. Whether the taxation of national bank shares in the State of Ohio in the year 1885, without permitting the shareholders to deduct from the assessed value of his shares the amount of his *bona fide* indebted-

ness existing on the Wednesday next preceding the second Monday in May, 1885, and on the day preceding the second Monday in April, 1885, is a discrimination forbidden by the act of Congress, the said shareholders not having deducted said *bona fide* indebtedness from any credits owned by them at either of said dates. 5. Whether the demand for such deduction, first made on the 17th day of
247 December, 1885, was sufficiently early to entitle complainant shareholders thereto. Whereupon, and on motion of the said defendant, by his counsel, that the points on which the disagreements have been made during the present term, be stated under the direction of the judges and certified under the seal of the court to the Supreme Court of the United States to be finally decided; it is ordered that the foregoing statement of the facts and the questions upon which the opinions of the judges were opposed, all of which are made under the direction of the judges, be, together with the record of this cause, certified to said Supreme Court according to the said request of the said defendant by his counsel, and pursuant to the statute in such case made and provided.

Dated this 22nd day of February, A. D. 1887.

HOWELL E. JACKSON,
*Circuit Judge.*
M. WELKER, *District Judge.*

Thereupon plaintiff offered in evidence the record of the case of The Mercantile National Bank of Cleveland *vs.* David H. Kimberly, as treasurer of Cuyahoga county, Ohio, contained in volume No. 16, of Chancery Records, pages 206 to 219, inclusive.

To which defendant objected as incompetent and irrelevant and as not pertaining to the issues made by the pleadings herein.

Said record is in the words and figures following, to wit:

April Term, 1888.

No. 4496.

At a stated term of the circuit court of the United States for the eastern division of the northern district of Ohio, begun and held in the city of Cleveland in said district on the first Tuesday in April, being the third day of said month in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and twelfth.

Present: The Honorable Howell E. Jackson, circuit judge, and the Honorable Martin Welker, district judge.

248 In the record and proceedings of said court then and there had, among other things appeared the following, to wit:

THE MERCANTILE NATIONAL BANK OF CLEVELAND
*vs.*
DAVID H. KIMBERLY, as Treasurer of Cuyahoga Co., Ohio.

Be it remembered that heretofore, to wit, on the 16th day of December, A. D. 1886, there was filed in the clerk's office of said court,

a bill in the above-entitled cause, which bill is in the words and figures following, namely:

*Bill.*

In the Circuit Court of the United States of America within and for the Northern District of Ohio, Eastern Division, *ss:*

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, Complainant,
*vs.*
DAVID H. KIMBERLY, as Treasurer of Cuyahoga County, Ohio, Respondent.
} Bill.

To the honorable the judges of the circuit court of the United States for the northern district of Ohio, eastern division:

Your orator, The Mercantile National Bank of Cleveland, Ohio, respectfully represents that it is a national banking association, incorporated under and by virtue of the act of Congress, entitled "An act to provide for a national currency secured by a pledge of United States bonds and to provide for the circulation and redemption thereof," approved June 3rd, 1864. And the amendments thereof, and is established and doing business in the city of Cleveland, in said northern district of Ohio, and brings this, its bill of complaint, against David H. Kimberly, as treasurer of Cuyahoga county, Ohio, a resident of said city of Cleveland, and a citizen of Ohio and of said northern
249 district, eastern division. And the grievance herein complained of arises and is exclusively founded on a violation by the defendant and others whose unlawful acts he is carrying into effect of rights of the shareholders of said national bank accorded them by section 5219 of the Revised Statutes of the United States, securing to said shareholders a restriction upon the taxation of the shares of stock of said bank by State authority, to that rate and limit assessed upon other moneyed capital in the hands of individual citizens of the State, as will herein fully appear. And, thereupon, your orator complains and says that it has a capital stock of $100,000.00, divided into 1,000 shares of one hundred dollars each, all of which is paid up, and certificates for the shares outstanding and owned by a large number of persons, some of whom are non-residents of said State of Ohio, and citizens of other States.

That, in accordance with section 2765 of the Revised Statutes of the State of Ohio, then in force, the cashier of your orator duly reported in duplicate to the auditor of said county, the resources and liabilities of said banking association, at the close of business on the Wednesday next preceding the second Monday in May, 1886, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and the par value of each share, as required by said section 2765. That, included in said return so made by said cashier, was the real estate owned by your orator at the valuation of $—; being the sum paid

by said bank therefor, which was already valued and equalized in conjunction with all the other real estate in the city of Cleveland by the proper board of equalization, at a taxable value of $—· and the tax thereon is otherwise and separately assessed and charged on the tax duplicate of said county, and paid by this complainant to the treasurer of said county, aside from the taxes set forth in this bill. That thereupon the said auditor pretended to proceed, as required by section 2766 of the Revised Statutes of Ohio, as amended March 9th, 1883, to fix the total value of such shares according to their true value in money, and fixed the same at $490,260.00, exclusive of the assessed value of its real estate; and made out and transmitted to the annual State board of equalization for incorporated banks a copy of the report so made by said cashier, together with the valuation of such shares as so fixed by said auditor; and your orator, from information and belief, alleges that the said county auditor for the purpose of more accurately determining and fixing the value of said shares, did meet with and consult the board
250 of equalization for the city of Cleveland, and the valuation by him reported to the State board of equalization was fixed and determined upon by said auditor, with the assistance and approval of said city board of equalization. That it is by law the duty of said city board of equalization to value and equalize for taxation all moneyed capital and personal property of every kind in the hands of individual citizens of the State of Ohio, resident in said city, and also to equalize the value of the said property with the valuation placed upon the real estate within said city for taxation, except only the capital, assets and shares of incorporated banks, that being the only property under the statute aforesaid referred to the said State board of equalization to be equalized; and the only property concerning which no mode whatever is provided by the statutes of Ohio whereby the valuation fixed thereon for taxation may be equalized with the valuation fixed on other moneyed capital in the hands of individual citizens of the said State, county and city, or with the valuation fixed on any other property, either real or personal; that said auditor placed a value upon said shares, which was in fact, and was known by him to be far in excess of the value fixed in said county on other moneyed capital in the hands of individual citizens of the State of Ohio, and of said city and county, and upon other real and personal property in said county; that the said State board of equalization, assuming and pretending to comply with the requirements of section 2808 and 2809 of the said Revised Statutes as amended March 9th, 1883, did examine the return aforesaid made by said cashier to said county auditor, and the value of such shares as fixed by said county auditor, but that said city board of equalization did not examine, as required by law, any other returns made by said county auditor, to the State auditor, and the said board did then pretend to equalize said shares to their true value in money and fixed the valuation thereof at $638,429.03, exclusive of the assessed value of its real estate; that said State board of equalization, so called, knowingly and designedly did fix a much higher per cent. of value and assessment for taxation upon

the capital stock and shares of your orator than upon the capital and shares of other banks organized and existing under the laws of the State of Ohio, and which they pretended to equalize, a much higher rate and per cent. than was assessed upon other moneyed capital in the hands of citizens of the State of Ohio, much higher than that fixed upon other moneyed capital in the hands of such citizens in the said county of Cuyahoga and city of Cleveland, and
251 much higher than that fixed upon other property, real and personal in said county and city; that about four-fifths of the taxes assessed in said city of Cleveland, and upon the stockholders of your orator upon their shares in the said bank are assessed and paid for the purposes and uses of the said city of Cleveland, and about one-tenth for the purposes and uses of the said county of Cuyahoga, and only about one-tenth for the purposes and uses of the State of Ohio; that said State board of equalization did not equalize the value of said shares with the value of shares in other banks or with the value of other moneyed capital in the hands of citizens of the State of Ohio, county and city, but designedly and intentionally placed a much higher value thereon, which valuation so purposely equalized and determined by said State board of equalization, the auditor of said State did certify to the said auditor of Cuyahoga county, which valuation so certified, the said county auditor did enter upon the tax duplicate of said county for the year 1886; that afterwards said county auditor did enter upon the tax duplicate of said county for the year 1886, against your orator's stockholders, a tax on such valuation of such shares of the year 1886, amounting in the aggregate to $15,833.04, and upon a valuation as aforesaid of such shares of $638,429.03, exclusive of the assessed value of its real estate; that a large part, to wit, at least — of the capital stock of your orator, is invested in the obligations and securities of the United States, and in the lawful money thereof, and that said tax so levied and assessed, was and is, in violation of law, unauthorized and void; that the said tax was levied on a valuation twenty-eight per cent. higher than that fixed by the county auditor aforesaid, and about four-fifths thereof for the city of Cleveland, to answer the various purposes of that municipal body; that said duplicate, as required by law, with the said taxes charged thereon, has been by said county auditor delivered to said David H. Kimberly, treasurer of said county of Cuyahoga, to be by him collected from your orator by distraint, attachment or other legal proceedings, as provided in said statutes, who will immediately proceed to enforce the collection thereof, either by a sacrifice of such shares by enforcing the lien thereon created by said statutes, or otherwise, unless restrained by the injunction of this honorable court. And your orator further represents and shows unto your honors that in and by the second section of the twelfth article of the constitution of said State, it is provided that "laws shall be passed taxing by a uniform rule all moneys, credits, invest-
252 ments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property, according to its true value in money," and in and by the third section of the same article

that "all property employed in banking shall always bear a burden of taxation equal to that imposed upon the property of individuals," and by the fourth section of the thirteenth article, it is still further provided that, "The property of corporations now existing or hereafter created, shall forever be subject to taxation the same as the property of individuals." And, in and by the act of Congress and under which your orator is incorporated, "The right of the State to tax any owner of its shares is made subject to this condition, that the taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such State." But your orator further represents, that a very large amount of the moneyed capital in the hands of individual citizens of said State, county and city, is not included in the valuation of personal property for taxation, but is by the laws and statutes of said State, wholly exempt; that in the property so exempt from taxation *is* included the shares of capital stock of all corporations organized under the laws of Ohio, and that the value of this class of property alone owned and in the hands of individual citizens of said State, residing in said city and county, is valued for taxation at not to exceed 40 per centum of its true value in money, and at a much less percentage of its value in money than that fixed upon the shares of your orator; thus placing upon the shares of your orator according to the value fixed by the auditor of said county, an unjust and unequal burden of taxation as compared with other property and moneyed capital within said county and city. And your orator further represents that on the 15th day of December, A. D. 1886, on behalf of the shareholders owning such shares, it duly tendered to said treasurer and offered to pay for the taxes due Dec. 20, 1886, on said shares the sum of $4,479.27, and is still ready and willing to pay the same as well as the other half on the same basis of valuation in manner and at the times provided by law for the payment of taxes; on or before the 10th of June A. D. 1887, if the treasurer will receive it, or the court so orders, the amount so tendered and received being the one-half of the tax assessed against the shares of the stock of said bank, excepting and deducting therefrom the tax unlawfully levied on the increase of valuation made by said State board of equalization for incorporated banks, and excepting the further deduction of the taxes assessed against 400 shares owned
253 by James Barnett, 150 shares by William Bingham, 600 shares by Lelah Chamberlain, 600 shares by S. L. Mather, 25 shares by C. L. Murfey, 45 shares by L. A. Murfey, 210 shares by E. R. Perkins and 240 shares by Amos Townsend; which tax on said shares was by said defendant remitted on proof made to him that said owners on the day preceding the second Monday in April, 1886, and for — months continuously thereafter were respectively indebted in legal *bona fide* debts in an amount exceeding the value of valuation of said shares in excess of all other credits from which any portion of said indebtedness was or could have been deducted or taken, which tax on said shares was illegally levied because of the fact that the respective owners thereof were each severally indebted as aforesaid in legal *bona fide* debts in an amount exceeding

the value of said shares in excess of all other credits from which the same were or could have been taken, of all of which said respective shareholders made due proof to the listing and taxing officers of said city and county. Your orator avers and insists that the taxes so levied and assessed against it on account of its said shares of stock are unjust, illegal and void for the following among other reasons, viz:

First. That said tax is levied and assessed against your orator directly, and is in violation of the act of Congress under which your orator is incorporated.

Second. That the laws of Ohio authorize and permit the owner of credits to deduct therefrom all debts owing by him, and requires him to list for taxation only the excess of credits over his indebtedness, and that such is the uniform practice throughout the State, and that under the laws of the same State the owner of capital stock of your orator is denied the right to deduct therefrom his indebtedness, but is required to list for taxation the whole number of shares owned by him, and not simply the excess of value of such shares over his indebtedness; and your orator insists that such discrimination results in the taxation of your orator's stock at a much greater rate than is assessed upon other moneyed capital in the hands of individual citizens of Ohio.

Third. Their property in this corporation is not valued in tax the same as property of individuals, and the burden of taxation upon it is very much greater, nor has any equality been preserved in the valuation for taxation of the shares of your orator as compared with other property in the locality where your orator is established; on the contrary, the valuation, in proportion to the value, is fully twice as much as that fixed upon other property, while the rate of levy is the same.

254 Fourth. The proceedings of said State board of equalization were irregular, illegal and of no binding obligation; for, while the said act proposes to give authority to examine and equalize the value of such shares as fixed by the county auditor, and as reported by him to the State auditor, yet, the said board did in fact examine and equalize as aforesaid, and not otherwise, the values of such shares fixed by the county auditor and returned by him to the State board of equalization; which value so fixed and returned, the State board were not authorized by law to examine, equalize or in any manner meddle with. While said act proposes to give authority to hear complaints and to equalize the value of shares as fixed by the county auditor, not increasing the aggregate more than 20 per cent. of such valuation, yet your orator avers that said board has proceeded without any complaint made against the valuation made by said auditor and without any notice to your orator or the other national banks located in the said city and county, or the shareholders thereof, to increase arbitrarily the valuation for taxation more than five hundred thousand dollars upon your orator and upon other national banks of the said city, and upon the shareholders thereof, without any hearing, or any opportunity for hearing, as is fairly required by said act.

Fifth. That the taxation of the shares of your orator's stock as aforesaid, is at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of Ohio.

Sixth. The necessary effect of the proceedings had in the assessment and levy of the taxes standing against your orator and the shares thereof owned by its said shareholders has been to deprive your orator and such shareholders, both in the matter of valuation and equalization, of all benefit of the constitution and general laws of the State, by which only uniformity in the burdens of taxation upon all description of property could be secured, to take from them the security afforded by the limitations of the act of Congress, and to impose upon them such excessive exactions as to make the franchises granted by said act comparatively valueless. And your orator further represents that, if the shares of said stockholders are permitted to be sold under the lien created on them by section 2839 of the said Revised Statutes of Ohio, or otherwise, irreparable injury would not only be done to each of the shareholders, but also to your orator; and it would thereby be subjected to great loss of standing and credit and other injuries, for the redress of which the law
255 affords no remedies, and the franchises with which your orator is invested by the act of Congress as aforesaid, would not only be greatly impaired in value, but if such illegal exactions are to be continued and be persisted in, would be rendered nearly useless; that the disability imposed upon your orator to make transfers or pay dividends of or upon shares upon which such illegal tax remain- unpaid, would damage all the ordinary business of your orator and introduce confusion and uncertainty into its transactions, and the consequent loss of public confidence upon which its success depends; or, if your orator should pay such illegal tax and attempt to deduct the amount from dividends or other funds of the shareholders in its hands—which many of its shareholders have already prohibited its doing—it would be subjected to a great multiplicity of suits, brought by its separate shareholders for so doing; and in any event, a great number of suits would be rendered necessary to adjust the rights of all the parties, and your orator would be subjected to great expense and irreparable injury thereby. Inasmuch, therefore, as your orator is remediless by the strict rules of the common law and relievable only in equity, it prays that said David H. Kimberly, as treasurer of said Cuyahoga county, may be made party defendant to this bill of complaint; that the writ of subpœna may issue against him, and that he may answer the premises; that your honors will grant unto your orator your writ of injunction, strictly restraining and enjoining, during the pendency of this suit, the said David H. Kimberly, as treasurer of the said Cuyahoga county as aforesaid, from collecting or attempting to collect from your orator or said individual stockholders by distraint or otherwise, any of the said taxes as the same stand charged on said duplicate, and that upon the final hearing hereof, the said tax may be declared and decreed wholly illegal and void; or, if your honors should consider your orator not entitled to the relief aforesaid, that the said respondent may be decreed to receive in full of said taxes

the sum so tendered by your orator and be perpetually enjoined from collecting or attempting to collect the balance of said taxes so illegally assessed, and for such other and further relief in the premises as equity and good conscience require.

BOYNTON & HALE,
*Solicitors for Complainant.*

256 UNITED STATES OF AMERICA, }
*Northern District of Ohio.* }

Be it remembered, that on this 16th day of December, 1886, personally came before me C. L. Murfey, who, being by me duly sworn, deposes and says that he is the cashier of the complainant in the foregoing bill of complaint; that he has heard the same read and knows the contents thereof; that all the allegations and statements therein contained as derived from the information of others, he believes to be true, and all other allegations and statements therein made are true in substance and in fact.

C. L. MURFEY.

Sworn to before me and signed in my presence this 16th day of December, 1886.

NORTON T. HORR, [SEAL.]
*Notary Public.*

And afterwards, to wit, on the 20th day of December, A. D. 1886, the following subpœna was filed in this cause in said court, viz:

*Subpœna.*

THE UNITED STATES OF AMERICA, }
*Northern District of Ohio, Eastern Division,* } *ss:*

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon David H. Kimberly, as treasurer of Cuyahoga county, if he be found in your district, to be and appear in the circuit court of the United States, within and for the district aforesaid, at Cleveland, on the first Monday in March next, to answer a certain bill in chancery filed and exhibited in the said court against him by the Mercantile National Bank of Cleveland. Hereof he is not to fail under the penalty of the law thence ensuing, and have you then and there this writ.

Witnessed, the Honorable Morrison R. Waite, Chief Justice of the United States, this 16th day of December, A. D. 1886, and in the one hundred and eleventh year of the Independence of the United States of America.

A. J. RICKS, *Clerk,*
By O. C. BEATTY,
*Deputy Clerk.* [SEAL.]

*Memorandum.*

The said defendant is required to enter his appearance in this suit in the clerk's office of said court, on or before the first
257 Monday of February, 1887, otherwise the said bill may be taken *pro confesso*.

A. J. RICKS, *Clerk.*

NORTHERN DISTRICT OF OHIO, *ss:*

On the 18th day of Dec., 1886, at Cleveland, Ohio, I delivered to the within-named David H. Kimberly, as treasurer of Cuyahoga county, Ohio, a true and duly certified copy of this writ.

W. S. GOODSPEED,
*U. S. Marshal,*
By JOHN ODELL, *Deputy.*

(Endorsed:) Returnable Feb. 7, 1887. Rule day for appearance Feb. 7, 1887. Rule day for answer March 7, 1887. Returned and filed Dec. 20th, 1886. A. J. Ricks, clerk.

And afterwards, to wit, on the 16th day of December, A. D. 1886, the following proceedings were had in this cause in said court, viz:

*Preliminary Injunction.*

United States Circuit Court for the Northern District of Ohio, Eastern Division.

MERCANTILE NATIONAL BANK OF CLEVELAND
*vs.*
DAVID H. KIMBERLY, as Treasurer of Cuyahoga County, Ohio.

This day came the complainant, the defendant not appearing under notice served upon him, and thereupon the notice for a preliminary injunction in said cause came on to be heard, and it is ordered that the respondent be and he is hereby enjoined from collecting the excessive taxes, which it is alleged in the bill he threatens to collect, until further order of this court. Said defendant is also enjoined from serving notice as such treasurer, forbidding the officers of said bank from making transfers of its shares or payment of dividends or other funds belonging to said shareholders. It is ordered that complainant execute this bond herein in the sum of $10,000.00, conditioned according to law, to indemnify said
258 defendant against any damage that may be awarded by the court in the premises. Said bond and sureties to be approved by the clerk of said court.

Done at chambers, in the city of Toledo, in said district, this 16th day of December, A. D. 1886.

M. WELKER,
*District Judge of the United States for said District.*

And afterwards, to wit, on the 17th day of December, A. D. 1886, the following bond was filed in this cause in said court, viz:

*Injunction Bond.*

Know all men by these presents, that we, The Mercantile National Bank and Truman P. Handy, are held and firmly bound unto David H. Kimberly, as treasurer of Cuyahoga county, Ohio, in the sum of ten thousand dollars, to the payment whereof we bind ourselves, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated this 18th day of December, A. D. 1886.

The condition of this obligation is such that whereas, the said The Mercantile National Bank, citizen of the State of Ohio, has filed in the circuit court of the United States for the northern district of Ohio, a bill in chancery against said David H. Kimberly, as treasurer of Cuyahoga county, Ohio, and *have* obtained an allowance of an injunction, as prayed for in said bill from the Honorable Martin Welker, one of the judges of said court. Now, if the said The Mercantile National Bank of Cleveland, Ohio, and Truman P. Handy shall abide the decision of said court in said cause and pay all moneys and costs which shall be adjudged against them in case the said injunction shall be dissolved, then these presents shall be void; otherwise to remain in full force.

THE MERCANTILE NATIONAL BANK
OF CLEVELAND,
By T. P. HANDY, *President.* [SEAL.]
TRUMAN P. HANDY. [SEAL.]

(Endorsed:) Approved and filed Dec. 17, 1886. A. J. Ricks, clerk.

And afterward, to wit, on the 20th day of December, A. D. 1886, the following copy of restraining order was filed in this cause in said court, viz:

259 *Restraining Order.*

THE UNITED STATES OF AMERICA, }
*Northern District of Ohio, Eastern Division.* }

In the Circuit Court of the United States for said District and Division.

Be it remembered, that on a hearing before the Honorable Martin Welker, one of the judges of said court, sitting at chambers on the 16th day of December, A. D. 1886, the following order was made and signed and ordered to be entered upon the records of the court, to wit:

THE MERCANTILE NATIONAL BANK OF Cleveland
*vs.*
DAVID H. KIMBERLY, as Treasurer of Cuyahoga County, Ohio.
} Chancery. No. 4496.

This day came the complainant, the defendant not appearing under notice served upon him, and thereupon the motion for a preliminary injunction in said cause came on to be heard, and it is ordered that defendant be, and is hereby enjoined from collecting the excessive taxes, which it is alleged in the bill he threatens to collect, until further order of this court. Said defendant is also enjoined from serving notice as such treasurer, forbidding the officers of said bank from making transfers of its shares or payment of dividends or other funds belonging to said shareholders. It is ordered that complainant execute its bond herein in the sum of $10,000, conditioned according to law, to indemnify said defendant against any damage that may be awarded by the court in the premises. Said bond and sureties to be approved by the clerk of said court.

UNITED STATES OF AMERICA,
*Northern District of Ohio, Eastern Division,* } *ss:*

I, Augustus J. Ricks, clerk of the circuit court of the United States within and for said district, do hereby certify that the within is a true copy of an order entered upon the chancery order book of said court, in the case therein entitled; that I have compared the same with the original entry of said order, and it is a true transcript therefrom.

Witness my official signature and the seal of said court at
260 Cleveland, in said district, this 17th day of December, A. D. 1886, and in the one hundred and eleventh year of the Independence of the United States of America.

AUGUSTUS J. RICKS, *Clerk,*
By O. C. BEATTY, *Deputy Clerk.* [SEAL.]

NORTHERN DISTRICT OF OHIO, *ss:*

On the 18th day of December, 1886, at Cleveland, Ohio, I delivered to the within David H. Kimberly, as treasurer of Cuyahoga county, Ohio, a true and duly certified copy of this writ.

W. T. GOODSPEED,
*U. S. Marshal,*
By JOHN ODELL, *Deputy.*

And afterwards, to wit, on Wednesday, the 23rd day of March, A. D. 1887, the following decree was entered in this cause in said court, viz:

*Order pro Confesso.*

THE MERCANTILE NATIONAL BANK OF CLEVELAND
*vs.*
DAVID H. KIMBERLY, as Treasurer of Cuyahoga County, Ohio.

It appearing to the court that said defendant has failed to plead, answer or demur to complainant's bill, and the time fixed therefor having passed, it is ordered upon motion of said complainant that the allegations of said bill be taken as true and confessed by said defendant, and that an order *pro confesso* be ordered against them.

And afterwards, to wit, on Wednesday the 27th day of April, A. D. 1887, the following decree was entered in this cause in said court, viz:

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,
*vs.*
DAVID H. KIMBERLY, as Treasurer of Cuyahoga County, Ohio.
Decree.

This cause having come *so* to be heard before the judgment
261 *pro confesso* ordered more than thirty days prior to this date, and the defendant still failing to plead, answer or demur, it is ordered that said decree be made absolute. And this cause having come on to be heard further upon all the allegations of the bill so confessed, and it appearing to the court that the amount of taxes and assessments admitted in said bill to be due December 20, 1886, to wit, the sum of four thousand four hundred and seventy-nine dollars and twenty-seven cents, being one-half of the taxes properly assessed for the year 1886 on the capital stock of said bank, has been paid by said respondent and said respondent is ready and willing to pay a like amount for the last half of said taxes falling due June 20, 1887, it is therefore ordered, adjudged and decreed that said respondent and his successors in office be forever enjoined from proceeding or attempting to collect any other or further sum on account of the first half of said taxes, and also from collecting or attempting to collect on account of the last half of said taxes to become due June 20, 1887, any portion except the sum of $4,479.26. It is ordered, adjudged and decreed that said respondent and his successors in office pay the costs of this suit to be taxed at $59.37, for which it is ordered that execution may issue as upon judgments at law.

And afterwards, to wit. on the 17th day of May, A. D. 1887, the following motion was filed in this cause in said court, viz:

In the Circuit Court for the Northern District of Ohio.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Complainant,
*vs.*
D. H. KIMBERLY, as Treasurer of Cuyahoga County, Ohio, Defendant.

*Motion to Vacate Judgment and Decree.*

Now comes the said defendant and moves the court to vacate and set aside the judgment *pro confesso* and the decree heretofore rendered in this action for the reason that a certain other action by said complainant against the treasurer of Cuyahoga county, involving the same questions by law as are presented in this cause
262 was at this term of said court certified to the Supreme Court of the United States on a certificate of division of opinion by the judges trying the same, and in view of that fact it was thereupon agreed by the counsel of said complainant and of said defendant that this action remain on the docket undisposed of until the termination of said action in the Supreme Court, and by reason of such agreement and relying thereon, the counsel for defendant did not file an answer herein within the rule day.

HADDEN, DISSETTE & COLLISTER,
JAMES LAWRENCE,
CLARENCE BROWN,
*Solicitors for Defendant.*

STATE OF OHIO, *Cuyahoga County*, } *ss:*

T. K. Dissette, one of the counsel for the above-named defendant, being duly sworn, says that he made an agreement with the counsel for complainant set forth in the foregoing motion; that the facts stated in said motion are true as he believes; that in the opinion of affiant the defendant has a good defense to the bill of complaint herein.

——.

Sworn to before me by the said T. K. Dissette and by him subscribed in my presence this 17th day of May, 1887.

——.

And afterwards, to wit, on the 28th day of June, A. D. 1887, the following order was filed in this cause in said court, viz:

*Decree to Set Aside and Leave to Answer.*

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,
*vs.*
DAVID H. KIMBERLY, as Treasurer of Cuyahoga County, Ohio.

In this cause it is ordered that the final decree heretofore rendered herein be set aside and also the decree *pro confesso*, and leave is hereby given to the defendant to answer in ten days.

And afterwards, to wit, on the 1st day of July, A. D. 1887, the following answer was filed in this cause in said court, viz:

263 *Answer.*

United States Circuit Court, Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, Complainant,
*vs.*
DAVID H. KIMBERLY, as Treasurer of Cuyahoga County, Ohio, Respondent.
} In Equity. No. 4496.

The answer of David H. Kimberly, treasurer of Cuyahoga county, Ohio, respondent, to the bill of complaint of The Mercantile National Bank of Cleveland, Ohio, complainant.

This respondent now and at all times hereafter reserving all manner of benefit and advantage to himself of exception to many errors and insufficiencies in complainant's said bill of complaint contained, for answer thereto or unto so much and such parts thereof as this respondent is advised is material for him to make answer unto, this respondent saith; he admits that said complainant is a duly incorporated banking association located and doing business in Cleveland, Cuyahoga county, Ohio, and that he is a citizen of said county, and is the duly elected and qualified treasurer of said county and is acting as such, and as such treasurer is charged with the collection of all taxes assessed and placed on the tax duplicate of said county by the auditor thereof, and by him delivered to this respondent for collection and that he intends, and unless restrained by the injunction of this honorable court, will be required by law to proceed to collect the taxes levied against complainant and its shareholders by the use of all needful lawful process. This respondent admits that complainant has its capital stock and that the same is divided and held as in its said bill set forth. This respondent admits that in pretended compliance with section 2765 of the Revised Statutes of Ohio, complainant's cashier made a return to the auditor of Cuyahoga county, Ohio, purporting to exhibit the entire resources and liabilities of the complainant at the close of business hours on the Wednesday next preceding the second Monday of May, 1886, together with a statement of the name and residence of stockholders, the number of shares held by each and the par value of each share, and that included therein was the real estate of complainant which had been valued and assessed as in
264 complainant's bill alleged; and respondent avers that thereupon the auditor of said Cuyahoga county fixed the total value of the shares of the complainant bank, after deducting the value of the real estate included in said statement of resources, as the same stood on the duplicate, at the sum named in the complainant's bill, and he avers that said valuation was not greater than the true value in money of said shares and was not greater

than the valuation of other moneyed capital in the hands of individual citizens of said State of Ohio, and he denies that the valuation of said shares should have been at any less sum. He denies that such valuation was at an excess of the valuation of other moneyed capital in the hands of individual citizens of said State or of said city of Cleveland or county of Cuyahoga. And this respondent says that he is informed and believes that at the close of business on said Wednesday next preceding said second Monday in May, 1886, and for more than two months next prior thereto, the true value in money of all the shares of said complainant bank was, and during all said period had been not less than one million, three hundred and eighty thousand dollars ($1,380,000.00) and of each of said shares not less than one hundred and thirty-eight dollars ($138.00); that the return made by the cashier of said bank to said auditor, as in said bill of complaint alleged, did not correctly exhibit the value of the assets of said bank, and that large amounts of valuable assets and property were omitted from said return, and that large amounts of evidences of indebtedness then part due, and other assets held and owned by said bank did not appear in said return at their true value. And the same appeared upon the books of said complainant bank and in said return, if at all, as of little or no value, though in fact, the same was of great value and a large proportion thereof was worth its full face value and was fully secured. By reason of the errors and omissions and inaccuracies in said return there was charged against the shareholders of said complainant bank a very much less amount of taxes for the year 1886 than ought to have been charged, and the said shares were assessed and valued for taxation at a very much smaller amount than their true value in money and at a very much smaller amount than real and personal property generally in Ohio, and particularly than other moneyed capital in the hands of individual citizens in the State of Ohio, and in said city and county wherein complainant is located.

He admits that said auditor of Cuyahoga county certified to the State board of equalization for incorporated banks,
265 the valuation by him placed upon the shares of the complainant bank. He denies that said auditor, for the purpose of more accurately determining and fixing the value of said shares, met with and consulted the board of equalization of the city of Cleveland or that the valuation by him reported to the State board of equalization was fixed upon and determined by said auditor with the assistance and approval of said city board of equalization. This respondent denies that the said action of said State board of equalization was in any respect illegal, unauthorized or oppressive; denies that said board disregarded the question whether its action placed the property of complainant at a higher valuation than the property of moneyed capital in the hands of individual citizens of said State; denies that said board disregarded any question of equality between the property of any corporations or individuals; denies that said board arbitrarily or otherwise, adopted any valuation, irrespective of the true value in money of the property so valued, without regard to the assessed value of any other

property. Denies that any discrimination was made against national banks; denies that the result of the valuations made by said auditor of Cuyahoga county and said board was to make a discrimination against complainant; denies that any discrimination against national banks including complainant, exists or has existed; denies that the average valuation for taxation of State banks is at any lower *complainant than upon the capital and shares of other* percentage of true value than the valuation for taxation of the shares of said complainant bank; and denies that the valuation for taxation of the State banks in said Cuyahoga county is at any lower percentage of true value, than the valuation for taxation of the shares of said complainant bank; and avers that if the shares of any State bank were valued for taxation at any lower percentage of their true value than the shares of the complainant bank were so valued, it was without the knowledge of the true value on the part of the said State board and of the auditor of the county in which said bank was located; he denies that said State board of equalization knowingly and designedly fixed a higher per cent. of value and assessment for taxation upon the capital stock and shares of complainant than upon the capital and shares of other banks organized and existing under the laws of Ohio; and denies that it fixed a much higher rate, or any higher rate per cent. of valuation than was fixed upon other moneyed capital in the hands of individual citizens of said State, or in the hands of the citizens of said county of Cuyahoga and city of Cleveland.

266 This respondent admits that said State board of equalization did examine the return so as aforesaid made by complainant's cashier to said county auditor and the valuation of such shares as fixed by said county auditor, and he admits that said State board of equalization fixed the value of shares of complainant's bank at the amount named in said complainant's bill. This respondent avers that said State board for the equalization of the shares of incorporated banks, consisting of the governor, the auditor of State and the attorney general, did meet on the third day of June, A. D. 1886, at the office of said auditor of State at Columbus, and having before them the statements and returns of the complainant's cashier and the valuation of complainant's shares fixed by said county auditor with like return and valuation of all the incorporated banks within the State of Ohio, and having full knowledge of the value of said shares irrespective of the return of said cashier, and of the value so fixed by said auditor, proceeded to fix the value of complainant's shares and equalize the same with the value of the shares of all other incorporated banks, both national and State, within the State of Ohio; that said board heard all complaints made against the valuations as fixed by the several county auditors throughout the State of Ohio and valued and equalized the valuation of the shares of all the incorporated banks within said State according to the rule prescribed by the laws of said State for valuing and equalizing the value of moneyed capital in the hands of individual citizens of said State; and in acting upon the shares of said complainant for the purpose of fixing their value and of

equalizing the same with that of other moneyed capital and with the shares of other national banks, said State board of equalization was governed by the same rules and adopted and used the same methods as those by which it was governed and which it used in equalizing the shares of all other incorporated banks for taxation, and the same as governed and were used by all other equalizing boards and all other officers of said State, county and city in the valuing and equalizing of all moneyed capital in the hands of individual citizens of said State and of all shares of stock in incorporated and unincorporated banks in said State, both State and national.

This respondent says that said State board of equalization did not, nor was it by law required to limit itself in fixing the valuation of said shares to the valuation thereof fixed by the auditor of said county of Cuyahoga, nor was it governed wholly by the value
267 as fixed by said city board of equalization or said auditor upon other moneyed capital in the hands of individual citizens or unincorporated banks in said county of Cuyahoga and city of Cleveland; but said State board being fully advised as to the valuation fixed upon the shares of other national banks and State banks, incorporated and unincorporated, throughout the State of Ohio, and upon other moneyed capital in the hands of individual citizens throughout said State, did fix and equalize the value of said complainant's shares upon the same basis as all other bank shares and other moneyed capital throughout the entire State of Ohio were fixed and valued.

This respondent further avers that by reason of the fact that said return of said cashier did not contain a full and complete statement of the assets of said bank as hereinbefore alleged, said shares were in truth and in fact valued by said State board of equalization at much less than their true value in money and at a less rate per cent. than other moneyed capital in the hands of individual citizens of said State. Respondent avers that said State board was in session at the capitol of the State for a long time, to wit, for the period of about six weeks, and that neither the said complainant nor its cashier or other officers nor any of its shareholders, nor any person in its or their behalf, brought before said board or presented to it any complaint or any statement of the several alleged matters and things now set forth in its bill of complaint. This respondent admits that after the value of said shares had been so equalized and determined by the State board of equalization, the auditor of said State certified to the auditor of Cuyahoga county the value so fixed, which valuation was thereupon entered upon the tax duplicate of said county for the year 1886 and the tax was thereafter entered against the stockholders of complainant on the valuation so fixed, and amounted in the aggregate to the sum set forth in complainant's bill.

This respondent denies that a very large amount, or any amount of the moneyed capital in the hands of individual citizens of said State, county or city, is not included in the valuation of personal property for taxation; denies that it is by the laws and statutes of

said State wholly exempt; denies that the shares of the capital stock of all corporations organized under the laws of Ohio are so exempt or that the value of such property, or of any property, in the hands of individual citizens of said State residing in said city and county was valued for taxation at not to exceed 40 per centum of its true value in money, or at a less percentage of its value
268 in money than the value fixed upon the shares of complainant; and it denies that if such property except the moneyed capital in the hands of individual citizens is so exempt, or is so valued, that it affords any ground for relief on account of the valuation fixed upon complainant's shares or that thereby any injustice or unequal or unlawful burden was placed upon the shares of complainant in violation of the laws of the United States. And this respondent avers that the shares in said complainant's bank were not and are not by law required to be valued and equalized with reference to the value fixed upon all property, real and personal, within the State of Ohio, or all property, real or personal, within said county of Cuyahoga or city of Cleveland, but that the same is required to be so valued and equalized that the taxation thereon shall not be at a greater rate than shall be assessed upon other moneyed capital in the hands of individual citizens of such States, and that within the meaning of said act of Congress the term moneyed capital means and embraces only such capital as is employed in banking and the capital employed by individuals when the object of their business is the making of profit by the use of their moneyed capital as money. And respondent denies that in all or any of said proceedings by said auditor of Cuyahoga county and said State board of equalization, or either of them, was there any violation whatever of the act of Congress of the United States fixing the terms upon which the capital and property of national banks shall be subject to taxation by the State authorities; and denies that there was any violation whatever of the protection afforded to complainant or its shareholders by said act of Congress. This respondent denies that for the reasons set forth in complainant's bill, or for any other reason, the taxes so levied and assessed against complainant on account of its said shares of stock are unjust, illegal and void; denies that complainant could have no relief from overvaluation, if any there was which respondent denies; denies that complainant is deprived of any of the conditions intended for its protection by the acts of Congress; and denies that it was compelled to seek relief from judicial tribunals, and avers that full, complete and adequate relief from all overvaluation is afforded by the statutes of the State, and it was the duty of the complainant to make known to the said State board its objections, if any it had, to the valuation fixed by the said auditor, and to the action of said State board in equalizing the value of complainant's shares. This respondent denies that it is the uniform practice throughout the State of Ohio to
269 authorize and permit the owner of credits to deduct therefrom all debts owing by him, or to require him to list for taxation only the excess of credits over his indebtedness, and he denies that

under the laws of said State, the shareholders of complainant are denied any right which is accorded to the owner or holder of other moneyed capital in the hands of individual citizens of said State; he denies that there is any discrimination in that regard against the shareholders of complainant; and he denies that complainant's shareholders, or any of them, were indebted as in the bill alleged, or that they were entitled to deduct any such indebtedness from their said shares of stock.

Further answering, this respondent says that the tenor and effect of the constitution and statutes of the State of Ohio and the statutes of the United States in respect to taxation, which are but partially and imperfectly set forth in complainant's bill of complaint, will more fully appear from the said statutes to which this respondent prays leave to refer.

And this respondent further answering, denies that the said complainant is entitled to the relief or any part thereof in its said bill of complaint demanded, and says that any other matter, cause or thing, in the said complainant's bill of complaint contained, material or necessary for this respondent to make answer unto and not herein and hereby wholly and sufficiently answered, confessed, traversed and avoided or denied, is not true to the knowledge or belief of this respondent, all of which matters and things this defendant is ready and willing to maintain and prove as this honorable court shall direct, and humbly prays that the provisional injunction heretofore granted herein, may be dissolved and that he may be hence dismissed with his reasonable costs and charges in this behalf sustained, and may be granted all other and further relief to which he may be entitled.

HADDEN, DISSETTE & COLLISTER,
*Solicitors for Respondent.*

THE UNITED STATES OF AMERICA, }
*Northern District of Ohio,* } *ss:*

David H. Kimberly, being duly sworn, says that he is the respondent in the foregoing answer; that he has read the same and knows the contents thereof, and that the same is true, except as to the matters and things therein stated to be on information and belief, and as to them he believes it to be true.

D. H. KIMBERLY.

270 Subscribed by the said David H. Kimberly in my presence and by him sworn to before me this 1st day of July, 1887.

FRANCIS O. BREY, [SEAL.]
*Notary Public.*

And afterwards, to wit, on the 19th day of July, A. D. 1887, the following replication was filed in this cause in said court, viz:

*Replication.*

United States Circuit Court, Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Ohio, Complainant,
*vs.*
DAVID H. KIMBERLY, as Treasurer of Cuyahoga County, Respondent.
} No. 4496. Equity.

Replication of complainant to the answer of respondent.

This repliant, saving and reserving unto himself now and at all times hereafter, all and all manner or benefit and advantage of exception which may be had or taken to the manifold insufficiencies of said answer, for replication thereunto, says that it will aver, maintain and prove its said bill of complaint to be true, certain and sufficient in law to be answered unto and that the said answer of the said respondent is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true. All which matters, and things this repliant is and will be ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by its said bill it has already prayed.

BOYNTON & HALE,
*Solicitors for Plaintiff.*

And afterwards, to wit, on the 26th day of July, A. D. 1887, the following stipulation was filed in this cause in said court, viz:

271 *Stipulation.*

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

THE NATIONAL BANK CASES OF CLEVELAND
*vs.*
DAVID H. KIMBERLY, as Treasurer of Cuyahoga County, Ohio.

It is stipulated and agreed between counsel of the national banks in the several cases now pending in said court, wherein The First National Bank, The Commercial National Bank, The Mercantile National Bank, The National Bank of Commerce, The Union National Bank, The Cleveland National Bank, The Ohio National Bank, and The National City Bank are respectively complainants, and said David H. Kimberly, as treasurer as aforesaid, is respondent; that the judgments heretofore entered in said cases, whether *pro confesso* or final, shall be vacated in said cases and said cases

stand on the docket of said court without further action until the case of The Mercantile National Bank *vs.* Horatio N. Whitbeck, as treasurer of Cuyahoga county, recently carried to the Supreme Court of the United States is decided by that court; and if the judgment in said case shall be affirmed by the Supreme Court of the United States, the injunction granted in each of the above-named cases shall be made perpetual at the costs of the defendant. It being hereby agreed by counsel with a view to avoid the expense of taking testimony in said cases, in case the same be tried, that the same rule of valuation found by said circuit court to prevail in Cuyahoga county in 1885, also prevailed in 1886, as respects the taxation of moneyed capital of all kinds, whether in the hands of individual citizens or otherwise.

Dated this 22nd day of June, A. D. 1887.

BOYNTON & HALE,
*Solicitors for said Banks.*
HADDEN, DISSETTE & COLLISTER,
*Attorneys for Defendant.*

272 And afterwards, to wit, on Monday, the 14th day of May, being a day of the April term, A. D. 1888, of said court, the following decree was entered in this cause in said court, viz:

*Decree.*

At this term the parties appeared by their solicitors, and this cause came on for hearing upon the bill, answer, replication and stipulation, and the court being fully advised in the premises, do find the allegations of the complainant's bill to be true and the equities of the case with the said complainant. And it appearing to the court that the amount admitted in said bill to be due to said respondent has, pursuant to a former order of this court, been paid by said complainant to the respondent and by the latter received, it is therefore ordered, adjudged and decreed that said respondent or his successors in office be forever enjoined from proceeding or attempting to collect and from collecting any part or portion of said tax or assessment remaining unpaid, to wit, $6,937.96. And it is further ordered, adjudged and decreed that said respondent or his successors in office pay the costs of this suit taxed at $159.37, for which it is ordered that execution may issue as upon judgments at law.

Thereupon plaintiff offered in evidence the record of the case of The Mercantile National Bank of Cleveland, Ohio, against David H. Kimberly, as treasurer of Cuyahoga county, Ohio, contained in volume No. 17, of Chancery Records, pages 48 to 61, inclusive.

To which defendant objected as incompetent and irrelevant and as not pertaining to the issues made by the pleadings herein.

Said record is in the words and figures following, to wit:

April Term, A. D. 1889.

THE UNITED STATES OF AMERICA, *Northern District of Ohio, Eastern Division,* } *ss:*

At a stated term of the circuit court of the United States, within and for the eastern division of the northern district of Ohio, begun and held at the city of Cleveland, in said district, on the first Tuesday in April, being the second day of said month in the year of our Lord one thousand eight hundred and eighty-nine and of the Independence of the United States of America the one hun red and fourteenth year.

273 Present: The Honorable Augustus J. Ricks, district judge.

Among the proceedings then and there had were the following, to wit:

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, *vs.* DAVID H. KIMBERLY, Treas. } Chancery. No. 4648.

Be it remembered that heretofore, to wit, on Dec. 15, 1888, a bill was filed in this cause and which is in the words and figures following, to wit:

In the Circuit Court of the United States of America within and for the Northern District of Ohio, Eastern Division, *ss:*

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, Complainant, *vs.* DAVID H. KIMBERLY, as Treasurer of Cuyahoga County, Ohio, Respondent.

To the honorable the judges of the circuit court of the United States for the northern district of Ohio, eastern division:

Your orator, The Mercantile National Bank of Cleveland, O., respectfully represents that it is a national banking association incorporated under and by virtue of the act of Congress entitled, "An act to provide for a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3rd, 1864, and the amendments thereof, and is established and doing business in the city of Cleveland, in said northern district of Ohio, brings this, its bill of complaint against David H. Kimberly, as treasurer of Cuyahoga county, Ohio, a resident of said city of Cleveland and a citizen of Ohio, and of said northern district, eastern division; and the grievance herein complained of arises and is exclusively founded on a violation by the de-

274 fendant and others whose unlawful acts he is carrying into effect of rights of the shareholders of said national bank accorded them by section 5219 of the Revised Statutes of the United States, securing to said shareholders a restriction upon the taxation

of the shares of stock of said bank by State authority, to that rate and limit assessed upon other moneyed capital in the hands of individual citizens of the State, as will herein fully appear. And thereupon, your orator complains and says that it has a capital stock of one million dollars ($1,000,000.00), divided into ten thousand shares of one hundred dollars each, all of which is paid upon and certified for shares outstanding and owned by a large number of persons, some of whom are now residents of said State of Ohio, and citizens of other States, that in accordance with section 2765 of the Revised Statutes of the State of Ohio, then in force, the cashier of your orator duly reported, in duplicate to the auditor of said county the resources and liabilities of said banking association at the close of business on the Wednesday next preceding the second Monday in May, 1888, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and the par value of each share as required by said section 2765; that included in said return so made by said cashier, was the real estate owned by your orator at a valuation of $149,260.00, being the sum paid by said bank therefor, which was already valued and equalized in conjunction with all the other real estate in the city of Cleveland by the proper board of equalization at a taxable value of $149,260.00; and the tax thereon is otherwise and separately assessed and charged on the tax duplicate of said county and paid by this complainant to the treasurer of said county aside from the taxes set forth in this bill; and thereupon the said auditor pretended to proceed as required by section 2766 of the Revised Statutes of Ohio, as amended March 9th, 1883, to fix the total value of such shares according to their value in money and fixed the same at $679,000.00, "exclusive of the assessed value of its real estate and made out and transmitted to the annual State board of equalization for incorporated banks a copy of the report so made by the said cashier together with the valuation of such shares as so fixed by said auditor; that the value was fixed by said auditor, was in fact, and was known by him to be far in excess of the value fixed in said county upon other moneyed capital of like amount in the hands of individual citizens of the State of Ohio, and of said city and county, to an amount of over $148,000.00; that the said State board of equalization, as-
275 suming and pretending to comply with the requirements of sections 2808 and 2809 of said Revised Statutes, as amended March 9th, 1883, did examine *and* return aforesaid made by cashier to said county auditor and the value of such shares as fixed by said county auditor; but that said State board of equalization did not examine as required by law any other returns made by said county auditor to the State auditor and the said board did then pretend to equalize said shares to their true value in money and fixed the valuation thereof at $679,000.00, being the same value fixed by said auditor exclusive of the assessed value of its real estate; that said State board of equalization, so called, and said auditor knowingly and designedly did fix a much higher per cent. of value and assessment for taxation upon the capital stock and shares of your orator than upon the capital and shares of other banks organized and existing

under the laws of the State of Ohio, and which they pretended to equalize, and much higher rate and per cent. than was assessed upon other moneyed capital in the hands of such citizens in the said county of Cuyahoga and city of Cleveland, and much higher than that fixed on other property real and personal in said county and city, that about four-fifths of the taxes assessed in said city of Cleveland, and upon the stockholders of your orator upon their shares in the said bank are assessed and paid for the purposes and uses of the said city of Cleveland, and about one-tenth for the purposes and uses of the said county of Cuyahoga, and only about one-tenth for the purposes and uses of the State of Ohio; that neither said auditor nor said State board of equalization did fix or equalize the value of said shares with the value of shares in other banks or with the value of the moneyed capital in the hands of individual citizens of the State of Ohio, county or city, but designedly and intentionally placed the excessive value aforesaid thereon, which valuation so purposely equalized, fixed and determined by said State board of equalization, the auditor of said State did certify to the said auditor of Cuyahoga county, and which excessive valuation so certified, the said county auditor did enter upon the tax duplicate of said county for the year 1888; that afterwards said county auditor did enter upon the tax duplicate of said county for the year 1888 against your orator, a tax on such valuation of such shares for the year 1888, amounting in the aggregate to $19,215.70, and upon a valuation as aforesaid of such shares of $679,000.00, exclusive of the assessed value of its real estate; that a large part of the capital stock of your orator is
276 invested in the obligations and securities of the United States and in the lawful money thereof, and that said tax so levied and assessed was, and is, in violation of law, unauthorized and void; that said tax was levied on a valuation over 27 per cent. higher than that authorized by law, and about four-fifths thereof for the city of Cleveland, to answer the various purposes of that municipal body; that said duplicate as required by law, with the said taxes charged thereon, has been by said county auditor delivered to said David H. Kimberly, as treasurer of said county of Cuyahoga to be by him collected from your orator by distraint, attachment or other legal proceedings as provided in said statutes—who will immediately proceed to enforce the collection thereof, either by a sacrifice of such shares by enforcing the lien thereon created by said statutes, or otherwise, unless restrained by the injunction of this honorable court. And your orator further represents and shows unto your honors that in and by the second section of the twelfth article of the constitution of said statutes it is provided that "laws shall be passed taxing by uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also real and personal property, according to its true value in money," and in and by the third section of the same article that, "all property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals;" and by the fourth section of the thirteenth article, it is still further provided that "the property of corporations now existing or hereafter created, shall forever

be subject to taxation the same as property of individuals;" and in and by the act of Congress under which your orator is incorporated, the right of the State to tax any owners of its shares is made subject to this condition: "That the taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such State. But your orator further represents that a very large amount of the moneyed capital in the hands of individual citizens of said State, county and city, is not included in the valuation of personal property for taxation, but is by the law and statutes of said State wholly exempt, that in the property so exempt from taxation *is* included the shares of the capital stock of all corporations organized under the laws of the State of Ohio and that the value of this class of property alone, owned and in the hands of individual citizens of said State, residing in said city and county, is valued for
277 taxation at not to exceed 40 per centum of its true value in money, and at a much less percentage of its value in money than that fixed upon the shares of your orator; thus placing upon the shares of your orator according to the value fixed by the auditor of said county an unjust and unequal burden of taxation as compared with other property and moneyed capital within said county and city. And your orator further represents that on the 14th day of December, A. D. 1888, on behalf of the shareholders owning such shares, it duly tendered to said treasurer and offered to pay for the taxes due Dec. 20th, 1888, on said shares the sum of $5,201.70, and is still ready and willing to pay the same as well as the other half on the same basis of valuation in manner and at the times provided by law for the payment of taxes, to wit, on or before the 20th of June, A. D. 1889, if the treasurer will receive it or the court so orders the amount so tendered is the one-half of the taxes assessed against the shares of the stock of said bank excepting and deducting therefrom the tax unlawfully levied on said excessive valuation by said auditor, and excepting the further deduction of the tax assessed against 200 shares owned by J. V. Painter; 50 shares by J. B. Zorke; 240 shares by Amos Townsend; 600 shares by Selah Chamberlain; 512 shares by E. R. Perkins; 40 shares by L. A. Murfey; 400 shares by L. A. Mather; 150 shares by W. Bingham; 560 shares by T. P. Handy; 50 shares by Mary H. Severance; 70 shares by J. Parmelee; 50 shares by L. H. Mather; 50 shares by T. A. Kelly; 50 shares by M. G. Mather; and 50 shares by C. L. Murfey. The owners of said shares on the day preceding the second Monday in April, 1888, and for months continuously thereafter were indebted respectively in legal, *bona fide* debts in an amount exceeding the valuation or value of said shares in excess of their credits from which any portion of said indebtedness was or could have been deducted or taken, which tax on said shares was illegally levied because of the fact that the respective owners thereof were each indebted as aforesaid in legal, *bona fide* debts in an amount exceeding the value of said shares in excess of all other credits, from which the same were and would have been taken, all of which said respective shareholders made due proof to the listing and taxing officers of said city and county at the time the cashier presented his state-

ment of the resources and liabilities of said bank; yet said defendant refused and still refuses to allow said deduction to be made, but insists on the payment of the tax placed on said duplicate
278 respective of the same; both said auditor and said State board of equalization refused and omitted to lessen and diminish the aggregate valuation of said bank shares by reason of said claims for deduction and thereby wholly refused to regard said act of Congress allowing said deduction to be made. Said defendant refused to receive the taxes so tendered unless *paid* orator would also at the same time pay the whole of the taxes so illegally assessed against said shareholders or on said shares. Your orator avers and insists that the taxes so levied, and assessed against it on account of its shares of stock are unjust, illegal and void for the following, among other reasons, to wit: First, that said tax is levied and assessed against your orator directly, and is in violation *to* the act of Congress under which your orator is incorporated. Second, that laws of Ohio authorize and permit the owner of credits to deduct therefrom all debts owing by him and requires him to list for taxation only the excess of credits over his indebtedness and that such is the uniform practice throughout the State, and that under the laws of the same State the owner of capital stock of your orator is denied the right to deduct therefrom his indebtedness, but is required to list for taxation the whole number of shares owned by him and not simply the excess value of such shares over his indebtedness, and your orator insists that such discrimination results in the taxation of your orator's stock at a much greater rate than is assessed upon other moneyed capital in the hands of individual citizens of Ohio. Third, their property in this corporation is not valued and taxed the same as individuals and the burden of taxation upon it is very much greater, nor has any equality been preserved in the valuation for taxation of the shares of your orator as compared with other property in the locality where your orator is established; on the contrary, the valuation in proportion to the value is fully twice as much as that fixed upon other property, while the rate of levy is the same. Fourth. The proceedings of said State board of equalization were irregular, illegal and of no binding obligation; for while the said act proposes to give authority to examine and equalize the value of such shares as fixed by the county auditor, and as reported by him to the State auditor, yet it furnishes no reason of comparison with other moneyed capital in the hands of individual citizens of the State. Fifth. That the taxation of the shares of your orator's stock, as aforesaid, is at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens
279 of Ohio. Sixth. The necessary effect of the proceedings had in the assessment and levy of the taxes standing against your orator and the shares thereof owned by its said shareholders, has been to deprive your orator and such shareholders, both in the matter of valuation and equalization, of all benefits of the constitution and general laws of the State by which only the uniformity of the burdens of taxation upon all descriptions of property could be secured to take from them the security afforded by the limitations

of the act of Congress and to impose upon them such excessive exactions as to make the franchises granted by said act comparatively valueless. And your orator further represents that, if the shares of said stockholders are permitted to be sold — the lien created on them by section 2839 of the Revised Statutes of Ohio or otherwise, irreparable injury would not only be done to each of the shareholders but also to your orator; and it would thereby be subjected to great loss of standing and credits and other injuries, for the redress of which the law affords no remedies, and the franchises with which your orator is invested by the act of Congress, as aforesaid, would not only be impaired in value, but if such illegal exactions are to continue and if persisted in, would be rendered nearly useless; so that the disability imposed upon your orator to make transfers or pay individuals of or upon shares upon which such illegal tax remained unpaid would damage all the ordinary business of your orator and introduce confusion and uncertainty into its transactions and the consequent loss of public confidence upon which its success depends, for if your orator should pay such illegal tax and attempt to deduct the amount from dividends or other funds of the shareholders in its hands—which many of its shareholders have already prohibited its doing, it would be subjected to a great multiplicity of suits brought by its separate shareholders for so doing; and in any event a great number of suits would be rendered necessary to adjust the rights of all the parties, and your orator would be subjected to great expense and irreparable injury thereby. Inasmuch, therefore, as your orator is remediless by the strict rules of the common law and relievable only in equity it prays that said David H. Kimberly, as treasurer of said Cuyahoga county may be a party defendant to this bill of complaint; that the writ of subpœna may issue against him, and that he may answer the premises that your honors will grant unto your orator your *right* of injunction strictly restraining and enjoining, during the pendency of this suit, the said David H. Kimberly, as treasurer of said Cuyahoga county, as afore-
280 said from collecting or attempting to collect from your orator or said individual stockholders by distraint or otherwise any of the taxes in excess of the amount so tendered, and that said respondent may be decreed to receive in full of said taxes the sum so tendered by your orator and be perpetually enjoined from collecting or attempting to collect the balance of said taxes so illegally assessed and for such other and further relief in the premises as equity and good conscience require.

BOYNTON, HALE & HORR,
*Solicitors for Complainant.*

UNITED STATES OF AMERICA, }
*Northern District of Ohio.* }

Be it remembered that on this 13th day of December, 1888, personally came before me Charles L. Murfey, who being duly sworn, deposes and says, that he is the cashier of the complainant in the foregoing bill of complaint; that he has heard read the same and knows the contents thereof; that all the allegations and statements

therein contained, as derived from the information of others, he believes to be true and all other allegations and statements therein made are true in substance and in fact.

CHARLES L. MURFEY.

Sworn to before me, and signed in my presence this 15th day of December, 1888.

[SEAL.] HARRISON J. UHLS,
*Notary Public.*

And afterwards, to wit, on Dec. 15th, 1888, a subpœna was issued in this cause and which is in words and figures following, to wit:

UNITED STATES OF AMERICA, } *ss:*
*Northern District of Ohio, Eastern Division,* }

To the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon David H. Kimberly, as treasurer of Cuyahoga Co., Ohio, if he be found in your district, to be and appear in the circuit court of the United States within and for the district aforesaid at Cleveland, on the first Monday in February next to answer a certain bill in chancery filed and exhibited in the said court against him by the Mercantile National Bank of Cleveland, Ohio. Hereof he is not to fail under penalty of the law hence ensuing and have you then and there this writ.

281 Witness, the Hon. Melville W. Fuller, Chief Justice of the United States, this 15th day of Dec. A. D. 1888, and in the 113th year of the Independence of the U. S. A.

[SEAL.] AUGUSTUS J. RICKS, *Clerk,*
By M. W. SANDERS,
*Deputy Clerk.*

UNITED STATES OF AMERICA:

*Memorandum.*

The said defendant is required to enter his appearance in this suit, in the clerk's office of said court on or before the first Monday of Jan., 1889, otherwise the said bill may be taken *pro confesso.*

A. J. RICKS, *Clerk.*

Endorsed: Northern district of Ohio, *ss:* On the 18th day of Dec., 1888, I made due service of this writ by delivering a true and duly certified copy thereof to the within-named David H. Kimberly, treasurer of Cuyahoga county, Ohio. B. F. Wade, U. S. marshal, by George Wyman, deputy.

And afterwards to wit, on Dec. 17, 1888, an order was entered in the order book, which is in the words and figures following, to wit:

*Order.*

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,
*vs.*
DAVID H. KIMBERLY, Treasurer.

A temporary injunction is hereby allowed in said case as prayed for in said bill of complaint to continue until the final hearing of said case, upon the complainant's executing to the defendant an undertaking in said causes in the sum of $18,000 conditioned to pay all costs and damages that may result to said defendant by reason of the amounts of said injunction, provided the same is wrongfully allowed together with the amount of taxes finally adjudged to be due from said complainant or its shareholders to defendant as such treasurer. Done at chambers at the city of Toledo, the 17 day of Dec., 1888.

N. WELKER,
*District Judge U. S., said District.*

282 *Notice.*

And afterwards, to wit, *of* Dec. 18, 1888, a notice was filed in this cause and which is in the words and figures following, to wit:

The U. S. Circuit Court within and for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,
*vs.*
DAVID H. KIMBERLY, Treas.

THE UNION NATIONAL BANK OF CLEVELAND, OHIO,
*vs.*
DAVID H. KIMBERLY, Treas.

THE COMMERCIAL NATIONAL BANK OF CLEVELAND, OHIO,
*vs.*
DAVID H. KIMBERLY, Treas.

THE OHIO NATIONAL BANK OF CLEVELAND, OHIO,
*vs.*
DAVID H. KIMBERLY, Treas.

THE NATIONAL BANK OF COMMERCE OF CLEVELAND, OHIO,
*vs.*
DAVID H. KIMBERLY, Treas.
Notice.

The defendant in the foregoing-entitled case is hereby notified that the respective complainants will apply to Judge Martin Welker
283 of the U. S. circuit court room in Toledo, Ohio, at three o'clock p. m., on Monday, Dec'r 17, 1888, for a temporary injunction in each of the said cases, as prayed for in the respective bill of complaint.

BOYNTON, HALE & HORR,
*Att'ys for Complainants.*

The defendant in said foregoing-entitled cases accepts service of above notice, and waives all objections as to the time of the hearing Dec'r, 1888, Cleveland, Ohio.

HADEEN, DESSETT & COLLISTER,
*Att'ys for Def't.*

*Bond.*

And afterwards, to wit, on Dec. 18, —, a bond was filed in this cause, and which is in the words and figures following, to wit:

Know all men by these presents, that we, E. R. Perkins and S. Chamberlain, are held and firmly bound unto D. H. Kimberly, as treasurer of Cuyahoga county, Ohio, in the sum of $18,000, to the payment whereof we bind ourselves, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 18 day of Dec., A. D. 1888.

The condition of the above obligation is such that whereas, the said Mercantile National Bank, a citizen of the State of Ohio, has filed in the circuit court of the United States for the northern district of Ohio, a bill in chancery against said D. H. Kimberly, as treas., and has obtained an allowance as prayed for in said bill from the Hon. Martin Welker, a judge of said court, to wit: Now, if the said Mercantile National Bank shall abide the decision of said court in said cause and pay all moneys and costs which shall be adjudged against it in case the said injunction shall be dissolved, then these presents shall be void; otherwise to remain in full force.

E. R. PERKINS. [SEAL.]
S. CHAMBERLAIN. [SEAL.]

*Restraining Order.*

And afterwards, to wit, on Dec. 20, 1888, a certified copy of restraining order was filed in this cause, and which is in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, }
*Northern District of Ohio, Eastern Division.* }

Be it remembered, that on a hearing before the Hon. Mar-
284 tin Welker, district judge, sitting at chambers, on the 17 day of Dec., A. D. 1888, the following order was made and signed and ordered to be entered upon the records of the court, to wit:

MONDAY, *Dec.* 17.

In the U. S. Circuit Court within and for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,
*vs.*
DAVID H. KIMBERLY, Treas., etc.

A temporary injunction is hereby allowed in said case as prayed for in said bill of complaint to continue until the final hearing of said cause, upon the complainant's execution to the defendant and an undertaking in said cause in the sum of $18,000, conditioned to pay all costs and damages that may result to said defendant by reason of the allowance of said injunction, provided the same is wrongfully allowed, together with the amount of taxes finally adjudged to be due from said complainant or its shareholders to defendant as such treasurer. Done at chambers at the city of Toledo, this 17 day of Dec., A. D. 1888.

A. M. WELKER,
*District Judge U. S., said District.*

THE UNITED STATES OF AMERICA, *Northern District of Ohio, Eastern Division,* } *ss:*

I, Augustus J. Ricks, clerk of the circuit court of the United States within and for said district, do hereby certify that the within is a true copy of order entered upon the chancery order book of said court in the case therein entitled. That I have compared the same with the original entry of said order and it is a true transcript therefrom and of the whole thing.

Witness my official signature and the seal of said court at Cleveland, in said district, this 18 day of Dec., 1888, and in the one hundred and thirteenth year of the Independence of the United States of America.

AUGUSTUS J. RICKS, *Clerk,*
[SEAL.] MARTIN W. SANDERS,
*Deputy Clerk.*

Endorsed: Northern district of Ohio, *ss:* On the 19 day of Dec., 1888, I made due service of the within order by delivering a
285 copy thereof, certified by the clerk of said court, to the within David H. Kimberly, treas. of Cuyahoga county, Ohio. B. F. Wade, U. S. marshal, by George Wyman, deputy.

*Restraining Order.*

And afterwards, to wit, on January 6, 1898, an order was made in this cause, and which is in the words and figures following to wit:

TOLEDO, OHIO, *Jan.* 6, 1889.

DEAR SIR: Please enter appearance of defendants in the following cases:

Mercantile National Bank *vs.* David H. Kimberly, treas., No. 4648.
Commercial National Bank *vs.* Kimberly, treas., No. 4649.
Ohio National Bank *vs.* Kimberly, treas., No. 4650.
Cleveland National Bank *vs.* Kimberly, treas., No. 4651.
Union National Bank *vs.* Kimberly, treas., No. 4652.
National Bank of Commerce *vs.* Kimberly, treas., No. 4653.

Yours truly,

DAVID WATSON, *Att'y General.*
BROWN, GIDDES & JACKSON,
*Of Counsel.*

A. J. Ricks, clerk of U. S. circuit court, Cleveland, Ohio.

*Decree.*

And afterwards, to wit, on Feb. 7, 1898, a decree was entered in this cause, and which is in the words and figures following, to wit:

It appearing to the court that the said defendant has failed to plead answer or demur to the bill of complaint herein, it is found that the said defendant is in default, and it is therefore ordered, adjudged and decreed that said bill of complaint be taken as confessed as against said defendant.

BOYNTON, HALE & HORR,
*Complainant's Solicitors.*

Feb. 7, 1889.

286 *Order.*

And afterwards, to wit, on Feb. 8, 1889, an order was entered in this cause, and which is in the words and figures following, to wit:

FRIDAY, *Feb.* 8, 1889.

The appearance of Brown, Giddes & Jackson, heretofore entered herein, attorneys in this cause for defendant, is now by leave of court withdrawn.

And afterwards, to wit, on Wednesday, March 13, 1889, an order was entered in this cause, and which is in the words and figures following, to wit:

The time in which the defendant may answer or plead in this cause is extended until April 1st.

And afterwards, to wit, on April 1st, 1889, an answer was filed in this cause, and which is in the words and figures following, to wit:

In the Circuit Court of the U. S., Northern District of Ohio, Eastern Division, *ss:*

MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,
*vs.*
DAVID H. KIMBERLY, as Treasurer of Cuyahoga County, Ohio. } Answer.

Now comes the defendant, David H. Kimberly, and for answer to the petition of the plaintiff filed herein, says: He admits that he is the duly elected and qualified treasurer of Cuyahoga county, Ohio; that the plaintiff is a national bank association incorporated under and by virtue of the act of Congress established and doing business in the city of Cleveland, in said northern district of Ohio, as alleged in said petition. He admits that the plaintiff has a capital stock of one hundred thousand dollars, divided into ten thousand shares of one hundred dollars each, all of which is paid up and certificates for the shares outstanding are owned by a large number of persons, some of whom are now residents of the State of Ohio. He admits that the cashier of said corporation
287 duly reported to said auditor of said county the resources and liabilities of said banking association at the close of business on Wednesday next preceding the second Monday in May, 1888, together with a full statement of the means and residences of the stockholders therein with the number of shares held by each and the par value of each share; that included in said return was the real estate owned by the plaintiff at the valuation of $—, which was already valued and equalized in conjunction with the other real estate in the city of Cleveland, at a taxable value of $149,260. He admits that the tax thereon is otherwise and separately assessed from the said shares of the said corporation on the tax duplicate of said county, and that said tax is paid aside from the taxes upon said shares of stock. He admits that the auditor of said county proceeded as required by sec. 2766 of the Revised Statutes of Ohio as amended March 9, 1893, to fix the total value of such shares according to their true value in money and fix the same at $679,000. exclusive of the assessed value of its real estate, and that said auditor transmitted to the annual State board of equalization the report so made by said cashier, together with the valuation of such shares so fixed by said auditor. He admits that the said State board of equalization did examine said returns so made by said county, and the value of said shares as fixed by said county auditor, and did fix the valuation of said shares at $679,000, and that being the same value fixed by said county auditor upon said shares exclusive of said real estate; but he denies that in fixing the valuation of said shares of stock by said auditor, or by said State board of equalization, or either of them, said valuation was knowingly, designedly fixed at a higher per cent., or in excess of value fixed in said county or other moneyed capital in the hands of individual citizens of the State of Ohio, and of said city and county. He denies that said

valuation is excessive or that the same is greater than that of other moneyed capital in the hands of individual citizens of the State of Ohio in the said city and county in the sum of $148,000, or any other sum whatsoever. He denies that the auditor did not fix or equalize the value of said shares with the value of shares in other banks. He denies that said auditor or State board of equalization did intentionally make any excessive valuation on the property or shares of plaintiff for the year 1888. He admits that said valuation so made by said auditor and said State of the equalization, was by the auditor of said State returned to the county auditor and
288 the same was placed upon the tax duplicate of said county for the year 1888, and that upon the valuation of such shares for the year 1888 the tax upon the same amounted in the aggregate to $19,215.70, upon the valuation aforesaid of said shares, exclusive of the assessed value of its real estate; he denies that said tax so levied and assessed was in any manner and is in any manner in violation of law, or that it was levied on a violation higher than that authorized by law. He admits that the second section of the twelfth article of the constitution of the State of Ohio provides: "Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, and also all real and personal property, according to its true value in money;" and the third section of the same article provides: "That all property employed in banking shall always have a burden of taxation equal to that imposed upon the property of individuals;" and that the fourth section of the thirteenth article provides: "That property of corporations now existing or hereafter created shall forever be subject to taxation the same as property of individuals." And that the act of Congress under which the plaintiff is incorporated authorized the taxation of its shares of stock subject to the condition, "that the taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of other individual citizens residing in said city and county. He denies that other moneyed capital in the hands of said individual citizens as valued for taxation at not to exceed 40 per cent. of its true value in money, and at a much less percentage of its value in money than that fixed upon the shares of the plaintiff herein by said county auditor and said State board of equalization. He denies that said plaintiff is required by said valuation to bear an unjust and unequal burden of taxation as compared with other property and moneyed capital within said county and city. He denies that said valuation so placed by said auditor and said State board of equalization is in violation of any law of the United States, or the State of Ohio. He denies that the valuation placed upon the shares of stock of the plaintiff is any greater in proportion of value of such shares than the valuation for a taxation fixed in said county upon other moneyed capital in the hands of other individual citizens of Ohio. He alleges that the valuation so fixed as aforesaid upon the shares of stock of the plaintiff *are* much less than their true value in money and much less than the value fixed upon other moneyed

capital in the hands of individual citizens of said city and
289 county, and each and every other allegation in said petition not specifically admitted herein this defendant denies.

Wherefore defendant prays that he may go hence with his costs.

HADDEN, DISSETTE & COLLISTER,
*Att'ys for Def't.*

STATE OF OHIO, *Cuyahoga County,* } ss:

D. H. Kimberly, being first duly sworn, says that the facts stated and allegations contained in the foregoing answer are true, as he verily believes.

D. H. KIMBERLY.

Sworn to before me by said D. H. Kimberly and by him subscribed in my presence, this 30th day of March, A. D. 1889.

ED. W. DISSETTE, [SEAL.]
*Notary Public.*

And afterwards, to wit, on April 12th, 1888, a replication was filed in this cause, and which is in words and figures following, to wit:

*Replication.*

Circuit Court of the United States, Northern District of Ohio, E. D.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Ohio, Complainant,
*vs.*
D. H. KIMBERLY, Treas., etc., Respondent. } Replication.

The replication of the above-named complainant to the answer of the above-named respondents.

The replicant, saving and reserving to itself now and at all times hereafter all and all manner of benefits and advantages of exception which may be had or taken to the manifold insufficiencies of the said answer for replication thereunto, says that it will now maintain and prove the bill of complaint to be true, *are* certain and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to reply unto by
290 this replicant, without this, that any other matter or thing whatsoever in the said answer contained material and effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true; all which matters and *this* this replicant will be ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by the said bill it has already prayed.

BOYNTON, HALE & HORR,
*Complainant's Solicitors.*

AUGUSTUS J. RICKS, *Clerk.*

And afterwards, to wit, on Saturday, September 28th, 1889, a decree was entered in this cause, and which is in the words and figures following, to wit:

*Decree.*

THE MERCANTILE NATIONAL BANK *vs.* D. H. KIMBERLY, Treas. } Chancery.

At this term the parties appearing by their respective counsel, this cause came on for hearing, and the court being fully advised in the premises from the testimony and exhibits adduced in the open court, and upon consent of respondent's solicitors, do find that the valuation of the shares of stock described in said bill of complaint for the year 1888 by the auditor of Cuyahoga county, as equalized by the State board of equalization for bank shares, was excessive in the sum of $129,000; that the true value of said shares was $550,000 instead of $679,000, as equalized by said board.

The court further find that there should be deducted from said first valuation the sum of $169,235, being the amount on which the particular shareholders named in said bill of complaint are not taxable, the same being less in amount and value than their *bona fide* debts from which they are entitled to have the same deducted, leaving the sum of $380,675, which is hereby declared to be the true valuation of the shares of said bank taxable under the act of Congress of said year 1888.

The court further find that the amount of taxes due from said complainant to said defendant on said valuation for said
291 years of $10,775.65, and that the residue and remainder of said taxes standing on the duplicate for said year against said bank or the shareholders thereof, were improperly levied and are illegal and void. It is therefore ordered, adjudged and decreed that the complainant paid to the said defendant as treasurer the said sum of $10,775.65, and that the said defendant and his successors in office be, and the same are hereby, perpetually enjoined from collecting or attempting to collect any portion of said excessive tax so declared to have been illegally paid and void.

It is further ordered, adjudged and decreed that the defendant pay the costs of this suit.

Thereupon plaintiff offered in evidence the record of the case of The Mercantile National Bank of Cleveland, Ohio, *vs.* Joseph C. Shields, as treasurer of Cuyahoga county, Ohio, contained in volume No. 20 of Chancery Records, pages 336 to 345, inclusive.

To which defendant objected as incompetent and irrelevant and as not pertaining to the issues made by the pleadings herein.

Said record is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
*Northern District of Ohio, Eastern Division.*

MERCANTILE NATIONAL BANK
*vs.*
JOSEPH C. SHIELDS, Treas.

Record of the proceedings, circuit court of the United States within and for the eastern division of the northern district of Ohio, in the cause and matter hereinafter stated and finally disposed of at a regular term of said court begun and held at the city of Cleveland, in said district, in the first Tuesday in October, being the third day of said month, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States of America the one hundred and eighteenth.

292 Present: The Hon. Augustus J. Ricks, United States district judge.

Among the proceedings then and there had were the following, to wit:

MERCANTILE NATIONAL BANK OF CLEVELAND, Ohio,
*vs.*
JOSEPH C. SHIELDS, as Treas. of Cuyahoga County, Ohio.
5122. Equity.

Be it remembered, that heretofore, to wit, on June 27th, A. D. 1893, a bill of complaint was filed herein by the Mercantile national bank in the words and figures following, to wit:

*Bill of Complaint.*

In the United States Circuit Court for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF Cleveland, Ohio,
*vs.*
JOSEPH C. SHIELDS, as Treas. of Cuyahoga County, Ohio.
Bill in Equity. No. 5122.

Your complainant, The Mercantile National Bank of Cleveland, Ohio, now comes and respectfully shows that it is a national banking association incorporated under and by virtue of the act of Congress, entitled "An act to provide for the national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof." Approved June 3rd, 1864, and the amendments thereof, and is established and doing business in the city of Cleveland, in said northern district of Ohio, and brings this its bill of complaint against Joseph C. Shields, treasurer of Cuyahoga county, Ohio, a resident of said city of Cleveland, Ohio, and a citizen of Ohio and of said northern district, eastern division.

The complainant further shows and avers that its grievance hereinafter complained of arises and is exclusively founded on the violation by the respondent and others, whose illegal acts he is carrying into effect, of the rights of the shareholders of the
293 said complainant national bank accorded to them by No. 5219 of the Revised Statutes of the United States, securing to said shareholders a restriction upon the taxation of the shares of stock of said bank by State authority at the rate and limits assessed upon other moneyed capital in the hands of individual citizens of the State as will hereinafter fully appear.

The complainant further says and avers that it has a capital stock of $1,000,000, divided into 10,000 shares of $100 each, all of which is paid up, and certificates for the shares outstanding and owned by a large number of persons, most of whom are residents of the State of Ohio; and in accordance with No. 2765 of the Revised Statutes of Ohio, then and now in force, the cashier of the complainant duly reported in duplicate to the auditor of said county the resources and liabilities of said banking association at the close of business on the Wednesday next preceding the second Monday in May, 1892, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and the par value thereof, as required by said section; that included in said return so made by said cashier was the real estate owned by the complainant valued at $168,000, separately assessed and charged on the tax duplicate of said county, and the tax thereon paid by the complainant to the treasurer of said county aside from the taxes set forth in this bill; that thereupon said auditor proceeded as required by No. 2766 of the Revised Statutes of Ohio, to fix the total value of such shares according to their true value in money, and fix the same at $600,000, exclusive of the assessed value of its real estate, and made out and transmitted to the annual State board of equalization of incorporated banks a copy of the report so made by said cashier, together with the valuation of such shares as was fixed by said auditor; that said State board of equalization, acting under — 2808 and 2809 of the Revised Statutes of Ohio, did examine the returns aforesaid made by said cashier to said county auditor, and the value of such shares as fixed by said county auditor, and did pretend to equalize said shares to their true value in money and fix the valuation thereof at $600,000, exclusive of the assessed value of its real estate, and both said auditor and said State board of equalization, so called, did fix and establish a much higher valuation for taxation upon and for the shares of the capital stock of the complainant than upon other moneyed capital in the hands of individual citizens of the State by refusing and disallowing any deduction
294 of the *bona fide* indebtedness of said shareholders of said capital stock from the valuation of said shares so fixed for taxation as is allowed to individual and other citizens of the State of moneyed capital invested in the credits hereinafter defined, and the auditor of State did certify the said valuation of said auditor of said county of Cuyahoga, which said auditor of said county did enter upon the tax duplicate of said county for the year 1892.

The complainant further avers that by No. 2730 of the Revised Statutes of Ohio, it is enacted that: "The term 'credits' shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable things or for labor or service due or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or within the State other than such as are held to be money, as hereinafter defined, when added together (estimating every such claim or demand at its true value in money) over and above the sum of legal *bona fide* debts owing by such persons."

The complainant further says that a large amount of moneyed capital in the hands of individual citizens of the State and of said county of Cuyahoga and State of Ohio, city of Cleveland, invested in promissory notes and other legal obligations, securities, claims and demands, is, by the aforesaid provision allowing a deduction of legal *bona fide* debts to be made therefrom, expressly exempted from taxation, thereby making an unjust and unlawful discrimination against moneyed capital invested in national bank shares, as to which no exemption or deduction is provided for by the laws of the State, which discrimination is in direct violation of the restrictions of said No. 5219 of the Revised Statutes of the United States, which provide that: "The taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such State."

The complainant further avers and shows that the following-named stockholders of said bank were, on the said date next preceding the second Monday of April, A. D. 1892, the owners of the number of shares of stock of said bank set opposite their respective names, to wit: Edwin R. Perkins, 370 shares; C. L. Murfey, 54 shares; L. A. Murfey, 145 shares; James Parmelee, 70 shares; Wm. G. Mather, 150 shares; Amos Townsend, 240 shares; James Barnett, 180 shares; A. S. Gorham, 50 shares; J. B. Painter, 400 shares; W. W. Boynton, 50 shares; Trueman P. Handy, 600 shares; Wm. Bingham, 150 shares; A. L. Withington, 30 shares. That said shares were
295 valued by said State board of equalization for taxation for the year 1892, at $149,340, and certified by said board to the auditor of Cuyahoga county, as the taxable value thereof, which value multiplies by the rate of .0275-100 cents on the dollar fixed for said year as the rate for taxation upon all property situated in said county upon the dollar's valuation, amounted on said shares to $4,106.84.

The complainant further says that at the day last named, and at the time the cashier of said banking association made return to the auditor of said county of the names and residences of the shareholders of said association with the numbers and par value of the shares of the capital stock of the said banking association for the year 1892, to wit, between the first and second Monday in May of the said year, each of said above-named shareholders was indebted and owing to others of legal *bona fide* debts the sum in excess of the credits from which, under the laws of Ohio he was entitled to deduct said debts to an amount equal to the par value of said shares,

which said excess of debts over credits as aforesaid, the said shareholders above named were entitled to have deducted from the assessed value of said shares so severally owned by them.

And the complainant further says that the auditor of said county in making the duplicate for the year 1892, did deduct and abate said indebtedness of said several shareholders from the assessed value of said shares so owned by them respectively, thereby exempting the same from taxation, and delivered the duplicate containing said deduction to the defendant, as treasurer of said county, and the complainant paid to said treasurer on or about the 20th day of December, 1892, the half taxes due from said shareholders under the laws of the State with said deductions allowed thereon.

The complainant further says that since said payment was made, the auditor of said county disregarding the rights of said shareholders in the premises, and professing to make correction of errors contained upon the duplicate, so in the hands of said treasurer on or about the 10th day of June, 1893, wrongfully and unlawfully added to said duplicate as against the shareholders above named the entire amount of said deduction so as aforesaid properly allowed, on the professed claim that said deductions were improperly allowed under the laws of the State of Ohio, and has assessed against the same the rate and percentage of taxation fixed for said city, county and State for 1892, and entered the same on said duplicate;

296 and the said defendant threatens and is about to collect by distraint or otherwise, the said tax on said shares of stock with said deductions disallowed.

The complainant further avers that by No. 2839 of the Revised Statutes of Ohio, it is declared that, any taxes assessed on any shares of stock or the value thereof, of any bank or banking association shall be and remain a lien on such shares from the first Monday in May in each year until such taxes are paid; and in case of nonpayment of such taxes at the time required by law, by any shareholder and after notice received of the county treasurer of the nonpayment of such taxes, it shall be unlawful for the cashier or other officers of such bank or banking association to transfer or permit to be transferred, the whole or any portion of said stock until the delinquent taxes thereon, together with costs and penalties shall be paid in full and no dividend shall be paid on any stock so delinquent, so long as such taxes, penalties or costs, or any part thereof remain due and unpaid." The complainant says that said defendant further threatens in case of non-payment of said taxes so unlawfully added to give the notice provided for in said section, and thereby prevent the transfer of any of said shares of stock from said shareholders or any other persons to whom they or either of them may have sold the same.

The complainant further says that if the shares of said stockholders are permitted to be sold under the lien created on them by said No. 2839 of the Revised Statutes of Ohio, or otherwise irreparable injury would not only be done to each of the shareholders, but also to the complainant, and it would thereby be subjected to great loss of standing and credit, for the redress of which the law affords

no remedy and the franchises with which your orator is invested by the act of Congress, as aforesaid, would be greatly impaired in value; and the disability imposed upon the complainant to make transfers or to pay dividends on or upon shares upon which such illegal tax remains unpaid would injuriously affect all its ordinary business and introduce confusion and uncertainty into its transactions, and the consequent loss of public confidence upon which its success depends; and if the complainant should pay said illegal taxes and attempt to deduct the amount from the dividends or other funds of the shareholders in its hands it would be subject to a great multiplicity of suits brought by its separate shareholders, by so doing, and, in any event, a great number of suits would be rendered necessary to adjust the rights of all the parties, and the complainant would be subjected to great expense and irreparable injury thereby. The com-
297 plainant says that a part of said shares upon which said deductions were allowed in the settlement for the tax due December 20th, 1892, have since then been sold and transferred on the stock books of complainant.

The complainant further avers heretofore, to wit, at a date prior to the April term of this court in the year 1887, the complainant brought suit against Horatio N. Whitbeck as treasurer of said Cuyahoga county, who then held such office to enjoin the collection of the excessive taxation of shares of said complainant, growing out of the refusal of the taxing officers of said county to allow the deductions of *bona fide* debts of stockholders from the assessed value of said shares, said Whitbeck then representing the same interest, sustaining the same interest, sustaining the same relations and charged with the same duties to the public as does the present defendant; and in said suit this complainant alleged by its bill the refusal by the then auditor of said county, to allow a deduction of *bona fide* debts of the shareholders from the value of shares of stock of said complainant owned in large part by the same stockholders as those above named, and in which action said treasurer of said county, admitting said refusal to allow said deductions so joined issue as to present the question of the right of said owners of said shares, to said deduction, in view of the laws of Ohio, the said laws being the same as the present laws of the State and those under which the taxing officers of said county acted in 1892 and 1893, in making assessments and in refusing deductions to be made of *bona fide* debts of stockholders from the valuation of said shares; and the complainant says that upon the issue so joined, the said court at its April term, A. D. 1887, held and determined that said shareholders were by law entitled to said deduction of *bona fide* debts from the value of their said shares, to an equal amount fixed for taxation; and in said action the court gave judgment perpetually enjoining said treasurer from collecting or attempting to collect any tax or assessment on the valuation of said shares to an amount equal to said debts from which said deduction was sought to be made and disallowed by said auditor, on the ground that said disallowance was a discrimination against money invested in national bank shares, prohibited by the act of Congress; and the complainant alleges that said issue, so de-

termined and adjudged, was between the same parties involved the same subject-matter and legislation and the judgment given therein remains wholly unreversed and is still in full force and op-
298 eration. The complainant further says that in pursuance of the statute of Ohio, authorizing them so to do the said commissioners of Cuyahoga county, extending the time for the payment of the last half of the taxes from 1892, from June 20th until July 20th, 1892; that on the 27th day of June, 1893, the complainant tendered to said defendant at his office as treasurer of said county, in lawful money of the United States, the entire tax due from the said shareholders of the complainant on their respective shares of stock, which said defendant refused to receive unless said complainant would also pay the tax levied on the amount of said deductions so as aforesaid at first properly allowed and, as aforesaid improperly and unlawfully placed on said duplicate as above stated. The complainant now and here brings into court the sum due said defendant as such treasurer for the tax lawfully levied on said shares against the complainant's said shareholders and submits and subjects the same to the order and direction of this court. Inasmuch, therefore, as the complainant is remediless by the strict rules of law, and relievable only in equity, it prays that said Joseph C. Shields, as treasurer of said county of Cuyahoga may be made a party defendant to this bill of complaint; that a writ of subpœna may issue against him, and that he may answer in the premises; that your honors will grant unto your petitioner during the pendency of this suit, your writ of injunction strictly restraining and enjoining the said Joseph C. Shields, as treasurer of said county of Cuyahoga, and his successor in office from collecting or attempting to collect from your petitioner or said individual shareholders, by distraint or otherwise, any of said taxes as the same stand charged on said duplicate, and that the said respondent may be decreed to receive in full of said taxes the sum so tendered by your petitioner, and so brought into court, and to be perpetually enjoined from collecting or attempting to collect the remainder of said taxes, being a portion so illegally assessed, and for such other and further relief in the premises as equity and good conscience require.

BOYNTON & HORR,
*Solicitors for Plaintiff.*

UNITED STATES OF AMERICA, }
*Northern District of Ohio.* }

Be it remembered that this 27th day of June, A. D. 1893, personally came before me C. L. Murfey, who being by me duly sworn, deposes and says that he is the cashier of the complainant
299 in the foregoing bill of complaint; that he has heard the same read and knows the contents thereof, that all the allegations and statements therein contained, as derived from the information of others, he believes to be true, and all other allegations and statements therein made are true in substance and in fact.

C. L. MURFEY.

Sworn to before me and in my presence subscribed this 27th day of June, A. D. 1893.

[SEAL.] LELAND INGERSOLL,
*Notary Public.*

Tax, notarial fees 40 cents.

CLEVELAND, OHIO, *June 27th*, 1893.

I hereby waive the issuing and service of process in the above case and enter my appearance therein.

J. C. SHIELDS, *Treas.*,
By T. K. DISSETTE, *His Att'y.*

Which said bill of complaint was endorsed as follows:

No. 5122. United States circuit court for the northern district of Ohio, eastern division. The Mercantile National Bank of Cleveland, Ohio, *vs.* Joseph C. Shields as treasurer of Cuyahoga county, Ohio. Bill in equity and entry of appearance, filed June 27, 1893. Irvin Belford, clerk, U. S. circuit court.

Afterwards on the same day, to wit, June 27, 1895, an order was made herein allowing temporary injunction which reads and is in the words and figures following, to wit:

*Order Allowing Injunction.*

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, *vs.* JOSEPH C. SHIELDS, as Treasurer of Cuyahoga County, Ohio. } No. 5122. Equity.

On motion of the orator by its term after due notice given to the respondent and good cause being shown therefor it is ordered that on an undertaking being given in the sum of $5,000 with sureties to the approval of the clerk of this court, the preliminary
300 writ of injunction issued herein restraining and enjoining said respondent Joseph C. Shields as treasurer of the county of Cuyahoga and State of Ohio, and his successors in office from collecting or attempting to collect from the orator or from its individual shareholders named in said bill by distraint or otherwise any of the taxes named in the bill as the same stand charged upon the duplicate of Cuyahoga county, except that said respondent is hereby given authority without prejudice to his rights in the premises, to receive from the orator $6,346.58, being the taxes by said orator's bill admitted to be justly due from it to said respondent, and that said writ remain in force until further order of this court.

Afterwards, to wit, on June 28th, A. D. 1893, an undertaking for injunction was filed herein by the complainant in the words and figures following, to wit:

*Injunction Bond.*

Know all men by these presents that we, Truman P. Handy and Charles L. Murfey are held and firmly bound unto Joseph C. ——, treasurer of Cuyahoga county, Ohio, in the sum of five thousand dollars, to the payment whereof we bind ourselves, our heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated this 27th day of June, A. D. 1893.

The condition of the above obligation is such that whereas, the said Mercantile — Bank, of Cleveland, Ohio, citizen of the State of Ohio, -as filed in the circuit court of the United States for the northern district of Ohio, the bill in chancery against the said Joseph C. Shields, as treasurer, and have obtained an allowance of an injunction as prayed for in said bill, from the United States circuit court, northern district of Ohio, E. div., now if the said The Mercantile National Bank, of Cleveland, Ohio, shall by the decision of the court in said cause, *and* pay all moneys and costs which shall be adjudged against — in case the said injunction shall be dissolved, then these presents shall be void; otherwise to remain in full force.

TRUMAN P. HANDY. [SEAL.]
CHARLES L. MURFEY. [SEAL.]

Which said injunction bond was endorsed as follows:

U. S. circuit court, northern district of Ohio. No. 5122. The Mercantile National Bank of Cleveland, Ohio, *vs.* Joseph C. Shields. Injunction bond. Approved and filed June 28th, 1893. Irvin Belford, clerk.

301 Afterwards, on the same day an injunction was issued out of and under the seal of th-s court in the words and figures following:

*Preliminary Injunction.*

THE UNITED STATES OF AMERICA, *Northern District of Ohio, Eastern Division,* } *ss:*

The President of the United States of America to Joseph C. Shields, as treasurer of Cuyahoga county, Greeting:

Whereas, The Mercantile National Bank of Cleveland, Ohio, a citizen of the State of Ohio, -as filed upon the chancery side of the circuit court of the United States, within and for the northern district of Ohio, a bill against the said Joseph C. Shields as treasurer of Cuyahoga county, Ohio, and has *at*tained an allowance of an injunction as prayed for in said bill, from Honorable Augustus J. Ricks, U. S. district judge, one of the judges of said court. Now, therefore, we having regard to the matters in said bill contained, do hereby command and strictly enjoin you, the — Joseph C. Shields, as treasurer of Cuyahoga county, Ohio, and your successors in office, from collecting or attempting to collect from said The Mercantile

National Bank, Cleveland, Ohio, or from its individual shareholders named in said bill by distraint or otherwise, any of the taxes named in the said bill as the same stand charged upon the duplicate of Cuyahoga county, Ohio, except that said treasurer is hereby given authority without prejudice to the rights in the premises to receive from said The Mercantile National Bank of Cleveland, Ohio, $6,346.58, being the taxes by said complainant's bill admitted to be justly due from it to said respondent. Which commands and injunctions you are respectfully required to observe and obey until our said circuit court shall make further order in the premises. Thereof fail not, under penalty of the law thence ensuing.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States this 28th day of June, A. D. 1893, and in the 117th year of the Independence of the United States of America.

IRVIN BELFORD, *Clerk.* [SEAL.]

Which said injunction was endorsed as follows: No. 5122. United States of America, northern district of Ohio, eastern division. In chancery. The Mercantile National Bank of Cleveland, Ohio, vs. Joseph C. Shields, as treasurer of Cuyahoga county, Ohio. 302 Injunction returned and filed June 28th, 1893. Irvin Belford, clerk, U. S. circuit court, N. D. O. Boynton & Horr, complainant's solicitors.

Afterwards, on the same day said writ was returned and filed, with the following marshal's return indorsed thereon:

NORTHERN DISTRICT OF OHIO, *ss:*

On this 28th day of June, 1893, at Cleveland, Ohio, I made due service *to* this writ upon the within-named Joseph C. Shields as treasurer of Cuyahoga county, Ohio, by leaving at his office with F. T. Pomeroy, deputy treasurer, true and certified copy thereof.

W. C. HASKELL,
*U. S. Marshal,*
By W. H. COOK, *Deputy.*

| | |
|---|---|
| Service | $2 00 |
| Copy | 1 00 |
| Travel | 50 |
| Writing return | 10 |
| | $3 00 |

Afterwards, at the April term, A. D. 1893, of this court, to wit, on September 30th, 1893, an order of continuance was made and entered herein as follows, to wit:

*Continuance.*

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,
*vs.*
JOSEPH C. SHIELDS, Treasurer. } Equity.

This cause is continued until the next term of this court.

Afterwards, at the October term, A. D. 1893, of this court, to wit, on October 3rd, 1894, the decree *pro confesso* was entered herein in the words and figures following, to wit:

303 *Decree pro Confesso.*

THE MERCANTILE NATIONAL BANK
*vs.*
JOSEPH C. SHIELDS, as Treasurer, etc., } 5122. In Equity.

It appearing to the court that the respondent, Joseph C. Shields, as treasurer and etc., has failed to enter his appearance herein and has failed to answer to the bill of complaint, and that the time therefor has expired, it is found that said respondent is in default and it is therefore ordered that the bill of complaint herein be taken as true and that the decree *pro confesso* be entered against him.

BOYNTON & HORR,
*Solicitors for Complainant.*

October 3rd, 1893.

Afterwards, at the October term, A. D. 1893, of this court, to wit, on November 4th, 1893, an order was made herein in the words and figures following, to wit:

*Order — Set Aside pro Confesso.*

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,
*vs.*
JOSEPH C. SHIELDS, Treasurer. } No. 5122. Equity.

In this cause the decree *pro confesso* heretofore entered herein is hereby vacated and set aside and leave is given respondent to file a demurrer herein instanter which is accordingly done.

304 Afterwards, on the same day the respondent came and filed herein its demurrer in the words and figures following, to wit:

*Demurrer.*

United States Circuit Court for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF Cleveland, Ohio, Plaintiff,
*vs.*
JOSEPH C. SHIELDS, as Treasurer of Cuyahoga County, Ohio, Respondent.
} No. 5122. Demurrer.

Now comes the respondent, Joseph C. Shields, treasurer of Cuyahoga county, Ohio, and demurs to the petition of complainant filed herein on the following grounds, to wit:

First. That there is a defect of parties plaintiff herein.

Second. That the facts stated and allegations contained in the petition of plaintiff aforesaid, do not constitute a cause of action herein.

T. K. DISSETTE,
*Attorney for Respondent.*

Oral hearing requested.

Which said demurrer was endorsed as follows: No. 5122. United States circuit court for the northern district of Ohio, eastern division. The Mercantile National Bank *vs.* Joseph C. Shields, as treasurer, etc. Demurrer filed December 4th, 1893. Irvin Belford, clerk, U. S. circuit court, N. D. O.

305 Afterwards, at the October term, A. D. 1893, of said court, to wit, on December 30th, 1893, an order overruling demurrer and adjudging for the complainant was made and entered herein as follows, to wit:

*Order of Decree.*

THE MERCANTILE NATIONAL BANK OF Cleveland, Ohio,
*vs.*
JOSEPH C. SHIELDS, as Treasurer of Cuyahoga County, Ohio.
} Equity. No. 5122.

The parties appearing by counsel this cause came on for hearing and by consent of the parties, the judgment or order *pro confesso* heretofore entered in said case is hereby effected; and the respondent has leave to demur to said complain*ant*; and thereupon came the respondent and demurred to the bill of complaint; and the cause came on for hearing upon said demurrer and was argued by counsel; on consideration whereof it is ordered, adjudged, and decreed that said demurrer be, and the same is hereby overruled, and the defendant electing to stand by his demurrer, the court upon further hearing defined the allegations of the complainant's bill to be true,

and that the tax therein sought to be enjoined was illegally assessed and entered upon the treasurer's duplicate for collection. It is therefore ordered, adjudged and decreed that the defendant and his successors in office be, and they are hereby perpetually enjoined from collecting, or in anywise or manner attempting to collect the said illegal tax set out and particularly described in said bill of complaint. It is further ordered and decreed that the defendant pay the costs of this suit; to the order and judgment of the court overruling the demurrer of the defendant to the complainant's bill, and to the granting of said decree in favor of the said complainant, the defendant *accepts* and prays an appeal to the circuit court of appeals for the sixth circuit, which is allowed. Bond for appeal fixed at $500.

Enrolled and signed this 29th day of December, A. D. 1894.

IRVIN BELFORD, *Clerk*,
By H. E. McCOLLUM, *Deputy*.

306 Thereupon plaintiff offered in evidence the record of the case of The Mercantile National Bank, of Cleveland, Ohio, *vs.* Joseph C. Shields, as treasurer of Cuyahoga county, Ohio, contained in volume No. 20 of Chancery Records, pages 393 to 405 inclusive.

To which defendant objected as incompetent and irrelevant, and as not pertaining to the issues made by the pleadings herein.

Said record is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
*Northern District of Ohio, Eastern Division,* } *ss:*

THE MERCANTILE NATIONAL BANK
*vs.*
JOSEPH C. SHIELDS, Treas. } No. 5197.

Record of the proceedings of the circuit court of the United States within and for the eastern division of the northern district of Ohio in the cause and matter hereinafter stated and finally disposed of at a regular term of said court begun and held at the city of Cleveland, in said district, on the first Tuesday in April, being the 3rd day of said month, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States of America the one hundred and eighteenth.

Present: Honorable Augustus J. Ricks, U. S. district judge.

Among the proceedings then and there had were the following, to wit:

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, Complainant,
*vs.*
JOSEPH C. SHIELDS, as Treasurer of Cuyahoga County, Ohio, Respondent. } Chancery. 5197.

Be it remembered that heretofore, to wit, on December 26th, A. D. 1893, the Mercantile National Bank, of Cleveland, filed

herein its bill of complaint in the words and figures following, to wit:

307 *Bill.*

In the United States Circuit Court for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, Complainant,
*vs.*
JOSEPH C. SHIELDS, as Treasurer of Cuyahoga County, Ohio, Respondent.

Bill in equity.

Your complainant, The Mercantile National Bank, of Cleveland, Ohio, now comes and respectfully shows that it is a national banking association incorporated under and by virtue of the act of Congress entitled: "An act to provide for the national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof;" approved June 3rd, 1864, and the amendments thereof, and is established and doing business in the city of Cleveland, in said northern district of Ohio, and brings this its bill of complaint against Joseph C. Shields, treasurer of Cuyahoga county, Ohio, and resident of said city of Cleveland, and a citizen of Ohio, of said northern district and eastern division.

The complainant further shows and avers that its grievance hereinafter complained of, arises and is exclusively founded on the violation by the respondent and others, whose illegal acts he is carrying into effect of the rights of the shareholders of the said complainant, national bank, accorded to them by No. 5219 of the Revised Statutes of the United States, securing to said shareholders a restriction upon the taxation of the shares of stock of said bank by State authority to the rate and limit assessed upon other moneyed capital in the hands of individual citizens of the State, as will hereinafter fully appear.

The complainant further says and avers that it has a capital stock of $1,000,000 divided into 10,000 shares of $100 each, all of which are fully paid up, and certificates for the shares are outstanding and owned by a large number of persons, most of whom are residents of the State of Ohio; and in accordance with No. 2765 of the Revised Statutes of Ohio, then and now in force, the cashier of the
308 complainant duly reported in duplicate to the auditor of said county the resources and liabilities of said banking association at the close of business on Wednesday next preceding the second Monday of May, 1893, together with a full statement of the names and residences of the shareholders therein with the number of shares held by each and the par value thereof, as required by said section; that included in said return so made by said cashier was the real estate owned by the complainant valued at $—, separately assessed and charged on the tax duplicate of said county;

that thereupon said auditor proceeded as required by No. 2766 of the Revised Statutes of Ohio, to fix the total value of such shares according to their true value in money, and fix the same at $600,000.00, exclusive of the assessed value of its real estate and made out and transmitted to the annual State board of equalization of incorporated banks, a copy of the report so made by the said cashier, together with the valuation of such shares as was fixed by said auditor; *at* said State board of equalization, acting under No. 2808 and No. 2809 of the Revised Statutes of Ohio, did examine the return aforesaid made by said cashier to said county auditor and the value of such shares as fixed by said county auditor, and did pretend to equalize said shares to their true value in money and fixed the valuation thereof at $600,000, exclusive of the assessed value of the real estate; and both said auditor and said State board of equalization did fix and establish a much higher value for taxation upon and for the shares of the capital stock of the complainant than upon other moneyed capital in the hands of individual citizens of the State by refusing and disallowing any and such deduction of the *bona fide* indebtedness of such shareholders of said capital stock from the valuation of said shares so fixed for taxation as is allowed to individuals and other citizens of the State on moneyed capital invested in the credits and securities hereinafter more particularly defined; and the auditor of the State did certify said valuation to the said auditor of said county of Cuyahoga which said auditor of said county did enter upon the tax duplicate of said county for the year 1893, with said deductions disallowed; that in estimating the value of the stock of complainant's shareholders the business and franchises of said bank are and were considered as a large element of value, and the value of said shares *were* largely increased by reason and in consequence thereof, while the shares of stock in nearly all domestic corporations of the State of Ohio, are by
309 the statutes of the State expressly exempted from taxation, the tax required being one levied and placed upon the property in which the companies' capital is invested, exclusive of its franchise, created by such inclusion of the franchise in the value fixed upon the shares of complainant while excluding it in the estimate of the value of the corporate property of other corporations, a discrimination prohibited by the act of Congress.

The complainant further says that all unincorporated banks and banking companies and private individuals of said State engaged in banking are expressly authorized by the statute of Ohio to deduct their *bona fide* debts from all their legal claims and demands, a right not given to the complainant's shareholders nor provided for them by any law of Ohio, but denied to said shareholders in the estimate of value of said shares by the auditor of the State board of equalization in refusing deductions on account of the shareholders' indebtedness.

The complainant further avers that by No. 2730 of the Revised Statutes of Ohio, it is enacted that: "The term credits shall be held to mean the excess of the sum of all legal claims and demands whether for money or other valuable things or for labor or service

due or to become due to the persons liable to pay taxes thereon, including deposits with banks, or with persons in or out of the State, other than such as are held to be money as hereinbefore denied, when added together (estimating every such claim or demand at its true value in money) over and above the sum of legal *bona fide* debts owing by such persons."

The complainant further says and avers that a large amount of moneyed capital in the hands of individual citizens of the State and of said county of Cuyahoga and city of Cleveland invested in promissory notes and other legal obligations, securities, claims and demands, is, by the aforesaid provision allowing a deduction of legal, *bona fide* debts to be made therefrom, expressly exempted from taxation, thereby making an unjust and unlawful discrimination against moneyed capital invested in national bank shares as to which no deduction or exemption is provided for by the laws of the State, which discrimination is in direct violation of the restrictions of said No. 5219 of the Revised Statutes of the United States, which provide that: "The taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

The complainant further avers and shows that the following-named stockholders of said bank were on the said day next
310 preceding the second Monday of April, A. D. 1893, the owners of the number and shares of stock of said bank set opposite their respective names, to wit:

| | |
|---|---|
| Mary B. Payne | 200 shares |
| A. S. Gorham | 50 shares |
| S. E. Williamson | 50 shares |
| J. B. Painter | 400 shares |
| W. G. Mather | 155 shares |
| T. P. Handy | 500 shares |
| Amos Townsend | 240 shares |
| Wm. Bingham | 150 shares |
| R. K. Hawley | 50 shares |
| E. R. Perkins | 530 shares |
| L. A. Murfey | 145 shares |
| C. L. Murfey | 61 shares |
| James Barnett | 180 shares |

That said shares were valued by said State board of equalization for taxation for the year 1893, $162,660, and certified by said board to the auditor of Cuyahoga county as the taxable value of the same; that the rate of taxation for all taxes assessed and collected for the year 1893 within said county, was .0279 on a dollar's valuation and amounted on said value of said shares to $4,527.36.

The complainant further says that on said day next preceding the second Monday of April, A. D. 1893, and at the time the cashier of said banking association made return to the auditor of said county of the names and residences of the shareholders of said association with the numbers and par value of the shares of the capital stock of said banking association for the year 1893, to wit, between the

first and second Mondays in May of said year, each of said above-named shareholders was indebted and owing to others of legal, *bona fide* debts, some in excess of the credits from which under the laws of Ohio he was entitled to deduct said debts to an amount equal to the value of said shares, which said excess of said debts *to an amount equal to the value of said shares, which said excess of said debts* over said credits as aforesaid the said shareholders above named were entitled to have deducted from the assessed value of said shares so severally owned by them proof of which fact was duly made to said auditor of said State board of equalization by said shareholders at the time that they respect*fully* fixed the valuation of said shares of stock. And complainant further says that both the auditor of said county and of said State board of equalization for banks
311 refused to allow the deduction of any indebtedness of said shareholders from the value of said shares, and made up and fixed the valuation of said shares in entire disregard of the right or claim of said shareholders to said deduction; and the said auditor has carried upon the duplicate delivered to the treasurer, the entire valuation of said shares so made without allowing and expressly refusing to allow any deductions therefrom by reason of any *bona fide* indebtedness of said shareholders to others.

The complainant further avers that by No. 2839 of the Revised Statutes of Ohio, it is declared that: "Any taxes assessed on any shares of stock or the value thereof, of any bank or banking association shall be and remain a lien upon such shares from the first Monday in May in each year, until such taxes are paid; and in case of non-payment of such taxes at the time required by law, of any shareholder, and after notice received of the county treasurer of the non-payment of such taxes, it shall be unlawful for the cashier or other officers of such bank or banking association, to transfer or permit to be transferred, the whole or any portion of said stock until the delinquent taxes thereon, together with costs and penalties shall be paid in full, and no dividend shall be paid on any stock so delinquent so long as such taxes, penalties or costs or any part thereof remain due and unpaid."

The complainant says that said defendant further threatens in case of non-payment of said taxes so unlawfully added to give notice provided for in said section, and thereby prevent the transfer of any of said shares of stock from said shareholders or any other persons to whom they or either of them may have sold the same. The complainant further says that if the shares of said stockholders are permitted to be sold under the lien created on them by said No. 2839 of said Revised Statutes of Ohio, or otherwise, irreparable injury would not only be done to each of the shareholders, but also to the complainant, and it would thereby be subjected to great loss of standing and credit, for the redress of which the law affords no remedy, and the franchises with which your orator is invested by the act of Congress as aforesaid, would be greatly impaired in value; and the disability imposed upon the complainant to make transfers or to pay dividends of or upon shares, upon which such illegal tax remains unpaid, would injuriously affect all its ordinary

business, and introduce confusion and uncertainty into its transactions and the consequent loss of public confidence upon which its success depends; and if the complainant should pay said il-
312 legal taxes and attempt to deduct the amount from dividends or other funds of the shareholders in its hands, it would be subjected to a great multiplicity of suits by its separate shareholders by so doing, and in any event a great number of suits would be rendered necessary to adjust the rights of all of the parties and the complainant would be subjected to great expense and irreparable injury thereby.

The complainant further avers that heretofore, to wit, at a date prior to the April term of this court in the year 1887, the complainant brought a suit against Horatio N. Whitbeck as treasurer of said Cuyahoga county, who then held such office, to enjoin the collection of the excessive taxation of shares of said complainant growing out of the refusal of the taxing officers of the said county to allow the deduction of *bona fide* debts of the stockholders from the assessed value of said shares, said Whitbeck then representing the same interest, sustaining the same relation and charged with the same duties to the public as does the present defendant; and in said suit this complainant alleged by its bill the refusal by the then auditor of said county to allow the deduction of *bona fide* debts of said shareholders from the value of shares of stock of said complainant owned in large part by the same stockholders as those above named, and in which action said treasurer of said county, admitting the said refusal to allow said deduction so joined issue as to present the question of the right of said owners of said shares to said deduction in view of the laws of Ohio, the said laws being the same as the present laws of the State, and those under which the taxing officers of said county acted in 1892 and 1893, in making assessments and in refusing deduction to be made of *bona fide* debts from the valuation of said shares; and the complainant says that upon the issue so joined the said court at its April term, A. D. 1887, held and determined that said shareholders were, by law, entitled to said deduction of *bona fide* debts from the value of their said shares to an equal amount fixed for taxation; and in said action the court gave judgment perpetually enjoining said treasurer from collecting any tax or assessment on the valuation of said shares to an amount equal to the said debts from which said deduction was sought to be made and disallowed by said auditor, on the ground that said disallowance was a discrimination against money invested in national bank shares, prohibited by the act of Congress; and the complainant alleges that said issue so determined and adjudged was be-
313 tween the same parties, involved the same subject-matter and legislation, and the judgment given therein is wholly unreversed and still in full force and operation.

The complainant further says that on the 19th day of December, 1893, it tendered to said defendant, at his office as treasurer of said county in lawful money of the United States the entire tax due from the said shareholders of the complainant on their respective shares of stock, which said defendant refused to receive unless said

complainant would also pay the unlawful tax on the shares of stock from which said deduction as aforesaid, are authorized and required; and the complainant now and here brings into court the sum due said defendant as such treasurer for the tax lawfully levied on said shares against the complainant's said stockholders, and submits and subjects the same to the order and direction of the court.

Your complainant further avers that there stands charged on the duplicate of said treasurer for the current year a tax of $300.00 upon the shares of stock of all the shareholders of complainant in said bank, which tax was professedly levied by the council of the city of Cleveland, by ordinance No. 3222 passed September 18th, 1893, a copy of which is hereto attached marked "Exhibit A" and made a part of this bill, the levies of which ordinance were certified in accordance with its provisions to the auditor of said county and by him placed upon the tax-lists of his office and the duplicate of the defendant for collection. The complainant says that by the terms of said ordinance the said city council ordained that "to provide for the construction and repair of sewers and for the payment of maturing principal and interest of bonds issued for cost of sewers therein, they *are* hereby levied on each dollar's valuation taxable property on the tax-list of 1893 within the limits of certain sewer districts among which is sewer district No. 9, ½ mill;" that said sewer tax against the shareholders of the complainant was levied in professed compliance with the terms of said ordinance on the shares of the shareholders of complainant, its bank being located in said sewer district.

The complainant further says that the only power possessed by the city council to levy tax and assessment for the construction and maintenance of sewers of the kind described in said ordinance is derived from sections 9295 and 9302 of the Revised Statutes of Ohio, being section 6 and 13 of the act entitled "An act to provide for the construction and repair of sewers in cities of the second grade of the first class." Passed April 16th, 1893, O. L. 143 (Re-
314 vised Statutes of Ohio, 9290, *et seq.*), by which section the power of the council is limited and restricted to assessments of the costs and expenses of constructing sewers to and "upon lots and land bounding or abutting on the streets, lanes, alleys, highways, market-places, public landings, commons or public grounds in or along which the same shall pass by the foot front or according to the valuation of the same on the tax-lists or according to the benefits, as it (the council) shall determine." And the complainant says that said city council, in the passage of said ordinance, exceeded its power in the premises, because the complainant says that said council was wholly without other authority in the premises than that conferred by said section of said act, which sections imparted no authority to levy any tax or assessment upon the personal property within the limits of the sewer districts, to defray the cost and expense of either the construction or maintenance of the sewer, wherefore the complainant alleges that said tax purporting to be a sewer tax standing upon the duplicate — the said defendant is wholly illegal and void. Inasmuch, therefore, as the complainant is rem-

ediless by the strict rules of law and relievable only in equity, it prays that said Joseph C. Shields, as treasurer of said Cuyahoga county may be made party defendant to this bill of complaint. that a writ of subpœna may issue against him and that he may answer the premises; that your honors will grant unto your petitioner during the pendency of this suit your writ of injunction strictly restraining and enjoining the said Joseph C. Shields, as treasurer of said county of Cuyahoga, and his successor in office, from collecting or attempting to collect from your orator or said individual shareholders by distraint or otherwise, any of said taxes as the same stand charged on said duplicate and that said respondent and his successors in office may be decreed to receive in full of said taxes the sum so tendered by your petitioner, and so brought into court, and to be perpetually enjoined from collecting or attempting to collect the remainder of said taxes being the portion so illegally assessed and for such other and further relief in the premises as equity and good conscience require.

THE UNITED STATES OF AMERICA, }
*Northern District of Ohio, of the Eastern Division.* }

Be it remembered that this 22nd day of December, A. D. 1893, personally came before me C. L. Murfey, who being by me
315 first duly sworn, deposes and says that he is the cashier of the complainant in the foregoing bill of complaint; that he has heard the same read and knows the contents thereof; that all the allegations and statements therein contained as derived from the information of others he believes to be true, and all other allegations and statements therein named are true in substance and in facts.

C. L. MURFEY.

Sworn to before me and in my presence subscribed this 22nd day of December, A. D. 1893.

[SEAL.] LELAND INGERSOLL,
*Notary Public.*

Tax fee, 40c.

EXHIBIT "A."—Ordinance 3222.

No. 3222. An ordinance to levy a tax to provide for the construction and repair of sewers and for the payment of maturing principal and interest of bonds issued for cost of sewers in certain sewer districts named herein.

SEC. 1. Be it ordained by the council of the city of Cleveland that to provide for the construction and repair of sewers and for the payment of maturing principal and interest of bonds issued for cost of sewers therein, there are hereby levied on each dollar of valuation of taxable property on the tax-list of 1893, within the limits of the following sewer districts respectively, the following respective rates:

In sewer district No. 1, 3 mills.
In sewer district No. 2, ½ mill.
In sewer district No. 3, ½ mill.

In sewer district No. 4, 3 mills.
In sewer district No. 5, 3 mills.
In sewer district No. 7, 3 mills.
In sewer district No. 9, ½ mill.
In sewer district No. 10, 3 mills.
In sewer district No. 11, 2 mills.
In sewer district No. 12, 3 mills.
In sewer district No. 14, 2 mills.
In sewer district No. 15, 3 mills.
In sewer district No. 16, 3 mills.
In sewer district No. 17, 3 mills.
In sewer district No. 18, 3 mills.
In sewer district No. 19, 3 mills.

In Commercial Street sewer district, 3 mills.

316 SEC. 2. That the city clerk is hereby directed to certify the foregoing levies to the county auditor as provided by law.

SEC. 3. This ordinance shall take effect and be in force from and after its passage and due approval by the board of equalization and assessment. Passed September 18th, 1893.

A. J. MICHEAL,
*President of the Council.*
HOWARD H. BURGESS, *City Clerk.*

Approved by the mayor September 21st, 1893.

Which said bill of complaint was endorsed as follows, to wit: U. S. circuit court, northern district of Ohio, eastern division. The Mercantile National Bank of Cleveland, Ohio, *vs.* Joseph C. Shields, as county treasurer, etc. Bill of complaint. Filed December 26th, 1893. Irvin Belford, clerk U. S. circuit court, N. D. O. Boynton & Horr.

Afterwards, to wit, on the same day, a subpœna in chancery was issued out of the clerk's office of this court in the words and figures following, to wit:

*Subpœna.*

THE UNITED STATES OF AMERICA, } *ss:*
*Northern District of Ohio, Eastern Division,* }

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon Joseph C. Shields, as treasurer of Cuyahoga county, Ohio, if he be found in your district, to be and appear in the circuit court of the United States, within and for the district aforesaid, at Cleveland, on the first Monday in March next to answer a certain bill in chancery, filed and prohibited in the said court against him by the Mercantile National Bank of Cleveland, Ohio. Hereof he is not to fail under the penalty of the law thence ensuing and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, this 26th day of December, A. D. 1893, and in the 118th year of the Independence of the United States of America.

[SEAL.] IRVIN BELFORD, *Clerk*,
By JOHN VAN NOSTRAN,
*Deputy Clerk.*

317 *Memorandum.*

The said defendant is required to enter his appearance in this suit in the clerk's office of this court, on or before the first Monday of February, A. D. 1894, otherwise the said bill may be taken *pro confesso*.

IRVIN BELFORD, *Clerk.*

Which subpœna was endorsed as follows: No. 5197. United States circuit court, northern district of Ohio, eastern division. In chancery. The Mercantile Nat'l Bank *vs.* Joseph C. Shields, treas. Subpœna. Returnable February 5th, 1894. Rule day for appearance February 5th, 1894. Rule day for answer March 5th, 1894. Returned and filed December 27th, 1893. Irvin Belford, clerk. Boynton & Horr, complainant's solicitors.

Afterwards, on December 27th, A. D. 1893, said subpœna was returned and filed in the clerk's office with the following marshal's return endorsed thereon, to wit:

NORTHERN DISTRICT OF OHIO, *ss:*

On the 27th day of December, 1893, at Cleveland, Ohio, I made due service of this writ upon the within Joseph C. Shields, treasurer of Cuyahoga county, Ohio, by delivering to him a true and duly certified copy thereof.

W. C. HASKEL, *U. S. Marshal*,
By B. F. SEYMOUR, *Deputy.*

Service, $2.00; copy, 50c.; travel, 50c.; return, 10c.;—$3.10.

Afterwards, to wit, on July 26th, 1893, an order was made and entered herein as follows:

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,
*vs.*
JOSEPH C. SHIELDS, as Treasurer of Cuyahoga County, Ohio.

318 On motion of the orator, by its attorney, after due notice given to the respondent and good cause being shown therefor, it is ordered that on an undertaking being given in the sum of $6,000 with sureties to the approval of the clerk of this court, a preliminary injunction issue herein restraining and enjoining said respondent, Joseph C. Shields, as treasurer of the county of Cuyahoga and State of Ohio, and his successors in office, from collecting or attempting to collect from the orator or from its individual shareholders named in said bill by distraint or otherwise, and of the taxes

named in the bill as the same stand charged upon the duplicate of Cuyahoga county, except that said respondent is hereby given authority without prejudice to his rights in the premises, to receive from the orator $6,106.32 being the taxes by said orator's bill admitted to be justly due from it to said respondent and that said writ remain in force until the further order of this court.

And afterwards, to wit, on December 26th, 1893, an injunction bond was filed herein, which bond reads and is in the words and figures following, to wit:

*Injunction Bond.*

"Know all men by these presents, that we, The Mercantile National Bank of Cleveland, Ohio, E. R. Perkins, are held and firmly bound unto Joseph C. Shields, as treasurer of Cuyahoga county, Ohio, and his successors, in the sum of six thousand dollars, to the payment whereof we bind ourselves, our successors, heirs, executors, administrators, firmly by these presents.

Sealed with our seals and dated this 26th day of December, A. D. 1893.

The condition of the above obligation is such that, whereas, the said The Mercantile National Bank of Cleveland, Ohio, as filed in the circuit court of the United States for the northern district of Ohio, a bill in chancery against the said Joseph C. Shields, as treasurer aforesaid, and has obtained an allowance of an injunction as prayed for in said bill from the Honorable A. J. Ricks, judge of the district court of the U. S. Now, if the said The Mercantile National Bank of Cleveland, shall abide the decision of the said court in said cause and pay all moneys and costs which shall be adjudged against it in case the said injunction shall be dissolved, then these presents shall be void; otherwise to remain in full force.

THE MERCANTILE NATIONAL BANK
OF CLEVELAND, OHIO.
By CHARLES F. MURFEY, *Cashier.* [SEAL.]
E. R. PERKINS. [SEAL.]

319 Which bond was endorsed as follows, to wit: U. S. circuit court, northern district of Ohio. No. 5197. The Mercantile National Bank of Cleveland, Ohio, *vs.* Joseph C. Shields, as treasurer of Cuyahoga county, Ohio. Injunction bond. Approved and filed on December 26th, 1893. Irvin Belford, clerk.

Afterwards, to wit, on December 26th, 1893, a writ of injunction was issued out of and under the seal of the clerk's office of this court in the words and figures following, to wit:

UNITED STATES OF AMERICA, *Northern District of Ohio, Eastern Division,* } *ss:*

*Writ of Injunction.*

The President of the United States of America to Joseph C. Shields, as treasurer of Cuyahoga county, Ohio:

Whereas, the Mercantile National Bank of Cleveland, Ohio, citizen of the State of Ohio, has filed on the chancery side of the circuit court of the United States, within and for the northern district of Ohio, a bill against Joseph C. Shields, as treasurer of Cuyahoga county Ohio, and has obtained an allowance of an injunction as prayed for in said bill from Augustus J. Ricks, U. S. district judge, one of the judges of said court. Now, therefore, we *have* in regard to the matters in said bill contained do hereby command and strictly enjoin you, the said Joseph C. Shields, as treasurer of Cuyahoga county, State of Ohio, and your successors in office, from collecting or attempting to collect from the orator of the Mercantile National Bank of Cleveland, Ohio, or from its individual shareholders named in said bill, by distraint or otherwise, any of the taxes named in the bill as the same stand charged upon the duplicate of Cuyahoga county, except that said respondent is hereby given authority, without prejudice, to his rights in the premises to receive from the orator $6,106.32, being the taxes by said orator's bill admitted to be justly due from it to said respondent, and that said writ remain in force until further order of this court. Which commands and injunctions you are respectfully required to observe and obey until our said circuit court shall make further order in the premises. Hereof fail not under penalty of the law thence ensuing.

320 Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 26th day of December, A. D. 1893, and in the 118th year of the Independence of the United States of America.

IRVIN BELFORD, *Clerk*,
By JOHN VAN NOSTRAN,
*Deputy Clerk.* [SEAL.]

Which said writ of injunction had the following endorsement thereon, to wit: No. 5197. United States circuit court, northern district of Ohio, eastern division. In chancery. The Mercantile National Bank *vs.* Joseph C. Shields, as treasurer of Cuyahoga county, Ohio. Injunction. Returned and filed December 27th, 1893. Irvin Belford, clerk. Boynton & Horr, complainant's solicitors.

Afterwards, to wit, on December 27th, A. D. 1893, said writ was returned and filed herein with the following marshal's return endorsed thereon: Northern district of Ohio, *ss:* On the 27th day of December, 1893, Cleveland, Ohio, I made due service of this writ upon the within-named Joseph C. Shields, as treasurer of Cuyahoga county, Ohio, by delivering to him a true and certified copy thereof.

W. C. Haskel, U. S. marshal, by B. F. Seymour, deputy. Service, $2; copy, 50c.; travel, 50c.; return, 10c.—$3.10.

Afterwards, at the October term, A. D. 1893, of said court, to wit, on February 5th, A. D. 1894, an order of continuance was made herein as follows, to wit:

*Continued.*

THE MERCANTILE NATIONAL BANK *vs.* JOSEPH C. SHIELDS, Treas. } No. 5197. Equity.

This cause is continued to the next term of this court, to wit, on March 5th, A. D. 1894, a decree *pro confesso* was entered herein upon the order book of this court, in the following words:

321 THE MERCANTILE NATIONAL BANK OF CLEVELAND, Complainant, *vs.* JOSEPH C. SHIELDS, as Treasurer of Cuyahoga County, Respondent. } No. 5197. In Equity.

*Decree pro Confesso.*

It appearing to the court that the respondent, Joseph C. Shields, as treasurer, etc., has failed to enter his appearance herein, and has failed to answer to the bill of complaint, and that the time therefor has expired, it is found that said respondent, Joseph C. Shields, as treasurer, etc., is in default, and it is therefore ordered that the bill of complaint herein be taken as true, and that a decree *pro confesso* be entered against said respondent.

BOYNTON & HORR,
*Solicitors for Complainant.*

March 5th, 1894.

*Continued.*

Afterwards, at the February term, A. D. 1894, of this court, to wit, on March 31st, 1894, an order of continuance was made and entered herein as follows, to wit:

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Ohio, *vs.* JOSEPH C. SHIELDS, as Treasurer, etc. } No. 5197. Equity.

This cause is continued to the next term of this court.

Afterwards, at the April term, A. D. 1894, to wit, on April 5th, 1894, a final decree was made and entered herein as follows, to wit:

*Final Decree.*

THE MERCANTILE NATIONAL BANK OF CLEVELAND
*vs.*
JOSEPH C. SHIELDS, as Treasurer of Cuyahoga County, Ohio.
} Equity. No. 5197.

This cause came on for hearing on the complainant's bill
322 of complaint and the evidence adduced in open court, the respondent not having appeared in the action, and being in default of answer to said bill, whereupon the court being fully advised in the premises, finds that each and every allegation of the bill of complaint is true. It is therefore ordered, adjudged and decreed that the order of injunction hereof *for* in this case issued against the respondent be made perpetual, and that said respondent and his successor in office as treasurer of Cuyahoga county, Ohio, be and they hereby are forever enjoined from in any manner collecting or attempting to collect from the complainant or from its individual shareholders the sewer tax of $300.00 assessed against said complainant and its shareholders on the valuation of its shares, for taxation for the year 1893; and forever enjoined from in any manner collecting or attempting to collect the sum of $4,527.36, taxes for the year 1893, assessed against the shareholders of the complainant named in the bill of complaint.

It is further ordered, adjudged and decreed that on payment by the complainant to the respondent in the June, 1894, collection of the sum of $6,106.32, such payment shall be in full satisfaction of all claims of the respondent or of his successor in office for the taxes for year 1893 standing upon his tax duplicate charged against said complainant, and its individual shareholders on the valuation for taxation of its capital stock, and that the respondent pay all the costs of this action.

Afterwards, on April 6th, 1894, the motion to vacate the decree herein was filed herein, in the words and figures following, to wit:

*Motion.*

United States Circuit Court for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, Complainant,
*vs.*
JOSEPH C. SHIELDS, as Treasurer of Cuyahoga County, Ohio, Respondent.

Motion to vacate decree in part and for leave to plead.

Now comes the respondent and moves the court here to set
323 aside and vacate the decree entered in this case so far as it concerns the sewer tax therein mentioned and enjoined, and

for leave to plead to the bill of complaint filed herein so far as it concerns the sewer tax therein mentioned and complained of.

JAMES LAWRENCE AND
ESTEP, WEH, HENRY,
*Attorneys for Respondent for said Sewer Tax.*

We hereby accept notice of the filing of the above motion and that the same will be called up and heard as soon as the attention of the court can be secured.

BOYNTON & HORR,
*Attorneys for Complainant.*

Which said motion was endorsed as follows, to wit:
United States circuit court. The Mercantile National Bank of Cleveland, Ohio, complainant, *vs.* Joseph C. Shields, as treasurer of Cuyahoga county, Ohio, respondent. 5197. Motion to vacate decree in part for leave to plead. Filed Apr. 6th, 1894. Irvin Belford, clerk, U. S. circuit court, N. D. O.

Afterwards, at the April term, A. D. 1894, to wit, on April 19, 1894, an order modifying the final decree was made and entered herein in the following words, viz:

*Order.*

THE MERCANTILE NATIONAL BANK OF CLEVELAND
*versus*
JOSEPH C. SHIELDS, Treasurer, etc.
} No. 5197. Equity.

By consent of the complainant the decree heretofore entered in this cause is vacated in so far as it relates to the sewer tax therein referred to, and by the further consent of the complainant, its
324 prayer for an injunction against the collection of said sewer tax is denied. In all other respects said decree is to remain in full force.

Enrolled and signed this 22nd day of August, A. D. 1895.

IRVIN BELFORD, *Clerk*,
Per H. M.

JAMES MOLYNEAUX, a witness produced on behalf of said complainant, being duly sworn, deposes and says as follows:

Direct examination.

By Judge BOYNTON:

Q. 1. You may state your name, age and place of residence.
A. Joseph R. Molyneaux; age, 59; residence, 832 Willson avenue, in the city of Cleveland.
Q. 2. You may state, Mr. Molyneaux, whether or not you were a member of the late city board of equalization for Cleveland.
A. I was.

Q. 3. The one that went out of office upon the holding of the supreme court, that the special act under which you had been performing your duties was unconstitutional?

A. Yes, I was a member of that board.

Q. 4. How long was you a member of it?

A. 6 years and two or three months.

Q. 5. Consecutively?

A. Yes.

Q. 6. From somewhere in 1892 to 1898—from the first Monday in May, 1892, till the final decision of the supreme court?

A. I don't know when it was.

Q. 7. You may state whether or not your board had occasion to fix values for taxation of bonds and stocks and promissory notes and credits during the period of your membership of the board.

To which question defendant objected, and to any testimony of this witness giving any acts of the board in regard to taxation matters as binding in this case or any other case for the reason that the supreme court of the State of Ohio held the board to be wholly illegal in its decision of June, 1898.

A. We did have occasion to fix values.

Q. 8. You may state whether the value that you so fixed went upon the duplicate of the county, and whether or not the tax
325 assessed upon that value was paid during the six years or more of your connection with the board.

To which question defendant objected for the reason that the acts of said board were void, and that courts have enjoined their action.

A. I presume they had been. I have no knowledge that the taxes have been paid.

Defendant objects to the answer.

Q. 9. You may state at what percentage of their actual value, bonds, stocks, promissory notes and other moneyed credits went upon the duplicate, or were assessed at during your membership of the board in the county.

To which question defendant objected on the ground that section 2739 requires all taxing officers and parties listing personal property to return the same at their true value in money, and that the statutory rules determine the amount they should return them at.

A. We had no jurisdiction outside of the city. My understanding of the position was as a member of the board of equalization it was our duty to equalize, as well as to fix values; that upon the theory of equalization if a party returned two-thirds value, we accepted it as correct.

Q. 10. Suppose he returned 60 per cent. of his moneyed securities?

A. If we were satisfied it was actually 60 per cent. without any doubt of the full value, we would accept that as correct.

Q. 11. You may state what you know of the existence of a rule

in the city with the board of equalization, or with those that had charge of assessing personal property, as to a percentage of actual value at which their property has been assessed for past years.

To which question defendant objected, and further objected to witness giving any rules in the face of the statute requiring them to assess the same at the true value in money.

A. We understood that that had been the custom, to accept about 60 per cent. of the actual value.

Defendant objected to the answer.

Q. 12. You may state how long that custom has existed to your knowledge.

A. At least six years.

Q. 13. What do you know of its existence prior to the time you went on the board?

To which question defendant objected.

A. From information given by former members of former boards.

326 Defendant objected to the answer.

Q. 14. From your information so obtained what was the percentage formerly assessed upon actual value of such property?

To which question defendant objected as calling for hearsay evidence.

A. Personal property about 60 per cent.

Q. 15. Including notes, bonds, credits, etc.?

A. Yes, about 60 per cent.

Q. 16. What do you know of the action of the various township assessors during those years respecting the value that they fixed upon such securities?

A. I have no knowledge of township assessors or their work.

Q. 17. You said a few moments ago in effect that you regarded it to be your duty as a member of the board of equalization to equalize values as well as to fix a value?

A. Yes.

Q. 18. You may state whether or not in equalizing values you were required to adhere to the 60 per cent. rule pretty strictly for the valuation of moneyed securities?

To which question defendant objected as leading, suggestive and incompetent.

A. Yes.

Q. 19. Could you have equalized values and made them substantially uniform, without adhering to the practice of valuing moneyed securities at about 60 per cent. of their actual value?

To which question defendant objected on the grounds last stated.

A. I think not.

Q. 20. And if you have any reason why you could not, you may give it.

A. I have none.

Q. 21. What do you know of valuation fixed on national bank shares in the city for the last ten years?

A. I have no knowledge of it whatever.

Q. 22. The valuation of these shares did not come before your board?

A. No, sir.

Q. 23. To what extent has the board of which you were a member, added values of moneyed securities during the six years of your membership thereof—approximate?

A. It would be difficult to divide personal property over and above that determined by the assessors. We have added in the neighborhood of $4,000,000 per year.

Q. 24. How much of that has been intangible property?

327 A. I could not say.

Q. 25. Can you approximate? Give your best judgment.

A. I don't know that I could without the footings of the different wards for the different years. I haven't the remotest idea how much upon any one class of property.

Q. 26. In these additions amounting, as you say, to $4,000,000 per year during your membership of the board, you may state at what percentage of actual value that amount of property was, or about what percentage.

To which question defendant objected.

A. At about 60 per cent.

Q. 27. So that in all the additions which you say amounted to some $4,000,000 a year during the six years of your membership, the valuation fixed by you as a board was about 60 per cent. of the actual value of the property?

A. Yes.

Q. 28. And you are unable to give approximately the percentage of intangible to tangible property, or the ratio of intangible to tangible property?

A. Yes.

Q. 29. Would you say it amounted to one-fourth, take bonds, stocks, credits and mortgages?

A. Yes, I think so.

Q. 30. So that for the six years of your membership of the board, you think, would you, that you added a million a year of intangible property or moneyed securities to the tax duplicate of the county?

A. I think so.

Q. 31. At what percentage do you say you made that addition to its actual value?

A. 60 per cent.

Q. 32. You may now state whether or not you have any knowledge as to how prevalent or extensive the 60 per cent. rule is throughout the State, and if you have any knowledge, how you obtained it?

To which question defendant objected.

A. We presumed that that was about the same as was fixed in the other cities in the State. I think it was from information from the members of the board of equalization at Cincinnati.

To which answer defendant objected.

Cross-examination of JOSEPH B. MOLYNEAUX.

By Mr. MONNETT:

Q. 33. And all your acts that you have been testifying to have been declared by the supreme court as illegal and void, be-
328 cause your board was constituted under an unconstitutional law?

To which question plaintiff objected.

A. I do not so understand.

Q. 34. You stated that you had duties to perform in the way of equalizing. Why did you say that?

A. That's the purpose for which we were appointed.

Q. 35. That was one of the purposes for which you took your oath of office?

A. Yes.

Q. 36. You did equalize, or tried to?

A. As we understood our duties.

Q. 37. Why did you adhere so closely to equalizing, and ignore the statute that you should find the value of bonds, stock and joint stock companies at the true value of money, and fix them as low as 60 per cent.? Why wasn't one part of the statute as binding on you as another?

To which question plaintiff objected.

A. Customs and former practice had made that part of it, as we understood it, proper.

Q. 38. Customs and former practices had also made an equality of value, had they not?

A. Yes.

Q. 39. You ignored what you call custom in one place and observed it in another? Why was that?

A. I don't know as we ignored custom in one place and adhered to it in another.

Q. 40. The statute requires you to equalize and you tried to do that?

A. Yes.

Q. 41. And the statute also requires you to find the true value in money, and that you disobeyed. Why did you ignore the one and follow the other?

A. My recollection is we followed the supreme court ruling. I cannot cite the case now.

By Judge BOYNTON:

Q. 42. You mean of the United States?

A. I don't know.

Q. 43. Do you mean the Whitbeck case?

A. That's one of them.

Q. 44. The Whitbeck case, as you understood, if the other property of the city is only a given per cent., that the national banks cannot be higher than that per cent. Is that what you followed substantially?

A. Substantially.

Q. 45. You took the national bank returns as standard, and brought the others down to that?

A. I don't think other property should be forced to pay more than bank property.

329 Q. 46. If your rule was adopted, and the national banks made return to your board under oath, $12,272,000, being the amount they returned for the year 1896 to the Comptroller of the Currency, will you tell how much under your rule you would return them for taxation? Under your rule how much would you have put them on the tax duplicate for?

To which question plaintiff objected.

A. $7,363,020.

Q. 47. If you had put them in at 66⅔, you would not have disturbed it? They would not have been contrary to the rule of equality?

A. They would not.

Q. 48. How much would two-thirds have been of that, and still come within the rule? You said if property had appeared on the tax duplicate at 66⅔ you would not disturb it, and considered it upon the duplicate as a fair average of the other.

A. Yes.

Q. 49. Taking that rule, if the national banks that reported under oath $12,272,000, had been presented to you at $8,180,000—two-thirds—would you have considered them as fairly treated with other property?

A. The difference would have been so slight we should not have called their attention to it.

Q. 50. Would you have considered it fairly treated at $8,180,000?

A. Yes.

Q. 51. Did you ever have any instructions from the county auditor or other taxing authority to change the statute that required you to return the stocks and bonds and investments for anything less than the true value thereof in money?

A. I have no recollection of any such instruction.

Q. 52. Whenever you did that you did it upon your own motion or your own idea of the law?

A. My idea of justice, one class of property with another.

Q. 53. Isn't it a fact that you testified before the taxation committee that property on the west side was taxed at about 100 cents on the dollar, while some was much lower?

A. Certain pieces of it, not the whole.

Q. 54. So that under the rule that you have voluntarily adopted outside of the statute, and taking your lowest estimate, your banks

of this city would have made it $7,363,000 and your highest
330 $8,180,000, while they actually were put on the tax duplicate at only $6,036,000. If your rule had been followed as to them, they would have been raised from $1,250,000 to $2,000,000?

To which question plaintiff objected as immaterial.

A. National banks did not come before our board.

Q. 55. Assuming that the plus amount of the county auditor as testified to is correct, that they were on the tax duplicate for $6,632,020, had such credits come before you, or such stocks and bonds, and you would put them on at 66⅔, you would have had to raise them about $2,000,000?

A. We should have brought them up to at least 60 per cent. of the face value.

Q. 56. Of what they returned under oath?

A. Yes.

Q. 57. That would be the minimum?

A. Yes.

Q. 56. Isn't 60 per cent. rather a flexible term that you have used to arrive at true values, as the auditor has given it? Do you take the arbitrary 60 per cent., regardless of the true merit?

A. To arrive at average values.

Redirect examination of JOSEPH B. MOLYNEAUX.

By Judge BOYNTON:

Q. 59. 60 per cent. is the average value?

A. Yes.

Q. 60. And if the bank had not returned to you for taxation, would you have put it in at 60 per cent. of its value as returned?

A. Of its actual value.

Q. 61. And in doing so would you have conformed to what you have understood to be the prevalent rule in this county for at least six years?

A. Yes.

Q. 62. Will you state whether or not your board, during your occupancy, treated deposits in savings banks in the city of Cleveland as credits belonging to deposits?

A. We permitted it to be used as an offset for credits.

To which answer defendant objected.

Q. 63. You permitted it to be used, not as money but as a credit?

A. As a credit, yes.

Q. 64. Why? Because it was payable on time?

A. Yes, by reason of the rule of savings banks that they might require notice before the money shall be drawn. It was not subject to check on demand.

331 Recross-examination of JOSEPH B. MOLYNEAUX.

By Mr. MONNETT:

Q. 65. Isn't it a fact that each of these savings banks just referred to have honored drafts and checks, and keep a running account the same as any or all banks, and have not enforced that rule but once in thirteen years?

To which question plaintiff objected.

A. I know that they received deposits on that condition, that they may require notice before it is paid. It is printed in their pass book.

Q. 66. But they never have enforced that rule, except in the panic of 1893?

A. I don't know. They may enforce it at any time.

Q. 67. But so far as actual practice is concerned, you can draw it out whenever you wish without any notice?

A. Yes.

Q. 68. That's another one of the customs of Cleveland that occurs in this taxation question, the custom of savings banks?

A. It might be so considered.

Redirect examination of JOSEPH B. MOLYNEAUX.

By Judge BOYNTON:

Q. 69. You may state whether or not that time rule of the savings bank is general throughout the savings banks of the city?

A. I think it is. The board of equalization worked upon that rule by reason of the written information from the corporation counsel or director of law upon their application to him for an opinion upon that subject.

Q. 70. The director of law of this city gave you an opinion stating what?

A. That these deposits were to be treated as credits.

Recross-examination of JOSEPH B. MOLYNEAUX.

By Mr. MONNETT:

Q. 71. Did you take the converse of the rule, that if they were to be treated as credits for the customer, they were to be assets in the hands of the bank? That the bank return them for taxation?

A. The bank returned them as deposits.

Q. 72. They were time certificates. They could not draw them only on notice. You let the bank treat them as deposits, and the customers treat them as time certificates?

A. On the theory that savings banks to a great extent were holding mortgages as an offset to deposits.

Q. 73. Did these savings banks you refer to return at any
332 time or any place or anywhere these notes that they held for money loaned out, whether mortgage notes or otherwise?

A. Not that I know of.

Q. 74. While you was doing that equalizing business, you did not equalize them on that?

A. We never took their mortgages under consideration. We never made a list of them.

Q. 75. Why was that?

To which question plaintiff objected as not being cross-examination of anything that plaintiff inquired about in the direct examination.

A. Because we treated them as a debt, and an offset to credits.

Q. 76. Aren't they obliged to return their debts and credits before you can strike a balance? Or did you have a custom of that kind in the city and follow the statute in that particular?

A. Perhaps that's the case.

Q. 77. Whatever is a violation of the tax laws in this city, you denominate that a custom?

A. Not entirely.

Q. 78. What do you define a custom to be?

A. A practice.

Q. 79. The habitual violation of a statute?

A. In some cases.

Whereupon the further taking of these depositions was adjourned until August 18th, 1898, at 9 o'clock a. m.

AUGUST 18TH, 1898—9 a. m.

Parties met pursuant to adjournment and resumed the taking of depositions.

Present: W. W. Boynton, counsel, N. T. Horr and E. S. Cook, solicitors for complainants. Frank S. Monnett, assistant attorney general, P. H. Kaiser, solicitor for Cuyahoga county, Ohio, for respondents.

NORTON T. HORR, a witness produced in behalf of said complainant, being duly sworn, deposes and says as follows:

Direct examination.

By Judge BOYNTON:

Q. 1. State your name, age and residence.

333 A. Norton T. Horr, 36 years, Cleveland, Ohio.

Q. 2. What is your business?

A. Attorney-at-law.

Q. 3. Formerly a member of the firm of Boynton & Horr?

A. Yes.

Q. 4. You may state, Mr. Horr, if you were at Columbus at any time for the purpose, among other purposes—of ascertaining what record had been made by the State board of equalization for bank shares in the year 1897, and if so, whether you examined the record.

A. I stopped at Columbus on the 31st day of December, 1897, for

the purpose of examining the records of the proceedings of the State board for that year, and I examined the records so far as they were then made up.

Q. 5. You may state whether there was anything in the record examined by you to the effect that the board adjourned at any of its meetings at the call of the governor.

To which question defendant objected.

A. The record, so far as it then existed, consisted of the record of the first three meetings of the board, and in each instance showed that the adjournment of each meeting had been made subject to the call of the secretary of the board, a man named Taylor. And there was no other record as to these three meetings of any other adjournment than that named.

Q. 6. Then the record examined by you did not show any adjournment subject to the call of any member of that board?

Same objection by defendant.

A. No, sir; it did not.

Q. 7. Mr. Horr, you may state what experience you have had in examination of books and making computations of figures and calculations and the like?

A. I have had frequent occasions for twenty years to make computations and work out mathematical conclusions in various matters.

Q. 8. You may state if you have examined the table No. 11 in the auditor of State's report for the year 1897, pages 326 to 334 inclusive, statement of valuation of national banks as returned to and fixed by the State board of equalization of bank shares for 1897, with a view of ascertaining the percentage on the total valuation that was fixed by the State board for its taxable value in the various counties of the State, and if so you may state the fact and the result.

334 To which question defendant objected on the grounds that it is not proper testimony for an expert to give, and as incompetent and irrelevant.

A. I made such examination and ascertained that according to that report the percentage of the assessed value of capital stock, surplus and undivided profits as fixed by the State board of equalization for incorporated national banks, after deducting the assessed value of the real estate, is a little over 61⅞ per cent. of the aggregate capital stock, surplus and undivided profit returned by all the banks throughout the State of Ohio. The percentage in the case of the aggregate national banks in the city of Cleveland I found to be 70.1 per cent. The percentage of the aggregate national banks in the State of Ohio, exclusive of those in the city of Cleveland, I found to be a trifle less than 60 per cent.

Q. 9. So that in the equalization made of the valuation of national bank shares by the State board at Columbus, the Cleveland banks were assessed 70.1 per cent., or about that, on their capital, surplus and undivided profits, while the other banks in the State were

assessed about 61 per cent. on the same—on their capital, surplus and undivided profits?

To which question defendant objected as leading, incompetent and irrelevant.

A. The other banks in the State a trifle less than 60 per cent. and the Cleveland banks 70.1 per cent.

Q. 10. Then, as I understand you, the national banks throughout the State, exclusive of those in the city of Cleveland—were valued by the State board of equalization at a little less than 60 per cent. of their capital, surplus and undivided profits; while the same board fixed the valuation of the Cleveland banks on their capital, surplus and undivided profits at a valuation of over 70 per cent.?

Same objection by defendant.

A. Yes, after deducting the assessed value of the real estate in each case.

Q. 11. You have taken out the assessed value of the real estate in all the banks?

A. Yes.

Cross-examination of NORTON T. HORR.

By Mr. BENNETT:

Q. 12. You may state, Mr. Horr, the process by which you arrived at the conclusions you did, which you have given in your examination-in-chief.

A. In ascertaining the ratio for the entire State I took the figures as given by the table No. 11 as correct, and ascertained
335 the aggregate of the capital stock, surplus and undivided profits; I deducted therefrom the assessed value of real estate and computed the percentage of the remainder represented by the aggregate of the value fixed by the State board, exclusive of real estate, as given in the table. In reaching the results, as to the national banks in the city of Cleveland, I followed the same process, using only those figures being under the statute relative to the banks in Cleveland, and followed the same process as to all the banks in the State of Ohio, excluding therefrom those in the city of Cleveland.

Q. 13. State whether or not you took into consideration any other moneyed capital except that invested as shown by table 11, referred to in the national banks of the State of Ohio.

A. My computation was based entirely on the information conveyed by table 11.

Q. 14. State whether you had any other factor to enter into this computation with regard to the banks in the city of Cleveland, except that which is contained in table 11.

A. None whatever.

Q. 15. How did you determine the percentage of the banks in the city of Cleveland as compared with the returns made by the various banks to the county auditor?

A. I made no effort to make any computations except those from the facts stated in this table.

Q. 16. How did you determine what percentage one number is of another?

A. By writing down upon paper the number of which I wished to ascertain the percentage, and writing down in front of it the number which constituted the devisor, and performing the necessary mathematical computation.

Q. 17. Then, you have the two factors, the divisor, and the dividend, as I understand you, so I can denominate them. State in your calculation with regard to the banks outside of the city of Cleveland and in the State of Ohio, what your dividend was in the computation.

A. It was the aggregate.

Q. 18. Give it in the figures.

A. I haven't my process here. I cannot give it. You can compute it yourself.

Q. 19. What was the aggregate of all the banks as returned outside of the city of Cleveland?

A. The dividend was the aggregate of value fixed by the State board, exclusive of real estate, as appears in table 11, and all the banks outside of those in the city of Cleveland.

336 Q. 20. I understand your process very well by which you arrived at this conclusion. But I thought when I asked the former question that you had your figures before you. You have not them with you?

A. I have not.

Q. 21. You cannot state what your divisor was, nor what your dividend was in arriving at the conclusion before stated?

A. Not from recollection.

Q. 22. Neither can you state what your devisor was or your dividend in regard to the computation concerning the banks in the city of Cleveland alone?

A. Not from recollection.

Q. 23. You have proceeded on the assumption entirely that the returns as made to the county auditor were the true returns or the true amounts of the taxable valuation of the property of the several banks referred to, have you not?

A. No, sir. I proceeded upon no assumption, because I was simply seeking to ascertain what results were derived from the use of this table, which I deemed to be true.

Q. 24. This table from which you have testified also shows the value as fixed by the State board of equalization of the various banks, does it not?

A. Exclusive of real estate it does.

Q. 25. In making the computation did you figure upon the basis as set forth in column 5 of the figures, viz., the column denominated "Value fixed by county auditors, exclusive of real estate?" Or did you base your calculations upon column 6, "Value fixed by State board, exclusive of real estate?"

A. I said before, exclusive of R. E. by column 6, value fixed by State board, exclusive of real estate.

Q. 26. So that in the percentage as given by you as the result of your calculations, the value of the real estate has not entered into it as a factor?

A. Not at all.

Q. 27. The only thing that you mean to testify to here is that using the combined values of the various banks referred to, dividing that by the other factor in your calculation, you arrived at the quotient in one instance of 70.1 per cent., and in the instance of the banks outside of the city of Cleveland, to the quotient of 60 per cent. Is that true?

A. That is correct, except that you have confounded the dividend with the divisor. The larger sum is the divisor, and the smaller sum is the dividend.

Q. 28. But you did not in this calculation add any factor
337 of truthfulness or untruthfulness to the reports as made in this paper?

A. I simply give you the results deduced mathematically from that table.

Q. 29. Do you know what the combined returns of the banks of the city of Cleveland, exclusive of real estate, is? If so, state.

A. I have no data in my present possession, except to recompute on this table.

Q. 30. You have made no data or calculation with regard to the amount returned to the Comptroller of the Currency by these same banks the same week that the returns were made to the county auditor for taxation, have you?

A. No, sir.

Q. 31. You assumed in your calculation, did you not, that for the purpose of establishing this percentage the amounts reported by the banks are the proper and the true amounts of their valuations?

A. It is not proper to say that I made any such assumption, because I did not start out with the intent of taking assumptions. I simply took percentages from that table.

Q. 32. Assuming then that their return is false in this that their true amount has not been set forth in their reports to the county auditor, and to the State board of equalization, would that not decrease the amount of percentage as fixed upon the banks in the city of Cleveland?

A. Any change in the figures used in this table would change the result. It would make the percentage greater if the amount they returned was too great, and less if the amount they returned was too small.

Q. 33. One of the issues in this case, as you probably know, being one of counsel, is that the reports as made out by the national banks in the city of Cleveland, and sent to the county auditor, and by him to the State board for equalization of the banks, is an untrue statement, and you do not wish to be understood as testifying in any regard that this statement is true or untrue, do you?

A. I simply wish to be understood as testifying to the results I derived from a mathematical computation based upon that report.

Q. 34. In regard to what was testified to by you as to the condition of the record in the auditor of State's office at Columbus—you have stated, have you not, that there were but the records of three meetings made up at the time you saw it?

A. As I remember it, that was the extent of the record at that time.

338 Q. 35. When did you see the record?

A. On the 31st of December, 1897.

Q. 36. Was the record at that time signed by the secretary?

A. It was signed by a man named Taylor as secretary of the board—each of those meetings.

Q. 37. Was it attested by him as secretary and signed by the governor?

A. It was not signed by the governor so far as I remember, but the record was in the handwriting of Mr. Taylor and he himself pointed it out to me as being the correct record of those meetings which had already been recorded.

Q. 38. Have you seen the record since December 31, 1897?

A. I have not.

Q. 39. Was it said to you by Mr. Taylor that that record was completed and verified by the board prior to the time you have seen the same?

A. I requested Mr. Taylor to show me the record of the proceedings of the State board of equalization for incorporated national banks, and he opened this book for me and said to me "That is the correct record of the proceedings so far as the record has yet been made. The subsequent meeting I still have in the original rough minutes, and have not made a permanent record."

Q. 40. Do you now recall the date of the minutes of the meetings that were recorded?

A. No, sir, I don't think I do.

Q. 41. Do you recall the dates from your reading of that record, of any one of the meetings?

A. Except inferentially, my recollection is that the date of the first meeting bore the date which I had theretofore ascertained to be the date at which the board should have met originally. Just what the actual date of the month was I cannot now state.

Q. 42. As far as your recollection goes, you cannot now state when the board went in session, whether their sessions were adjourned sessions, and whether they had *sine die* or not?

A. My recollection is that at the end of the record of the proceeding- of each of the three meetings on the back it said "Adjourned subject to the call of the secretary."

Q. 43. You have not now before you, while testifying, a copy of this record, nor have you the original record before you?

A. No, sir.

Q. 44. Did you at that time take a copy of the minutes?

339 A. I took a rough pencil copy of this portion, to which my attention was directed.

Q. 45. What did you do with it?

A. I kept it till we received a copy furnished by the auditor of State or Mr. Taylor.

Q. 46. Have you that copy before you?

A. No, sir.

Q. 47. So you are testifying entirely from you- recollection?

A. Yes.

Q. 48. Did the record show that there was any motion made by any member of that board to meet subject to the call of the secretary?

A. I don't think any of the minutes showed the making of a motion on that subject.

Q. 49. Did the minutes not show that there was a motion made to adjourn?

A. Possibly, I don't remember.

Q. 50. Do you remember whether or not it read, "Adjourn at the call of the secretary," or "Adjourn at the call of the governor"?

A. My recollection is limited on that. I think the language in the record was "Adjourn subject to the call of the secretary."

Q. 51. Are you one of the counsel for the complainants in the pending action, wherein the national banks of Cleveland are plaintiff- and R. S. Hubbard, as treasurer of Cuyahoga county, is defendant?

A. I don't think my name appears upon the petition, but I am interested for the plaintiff in each case.

Q. 52. Did you, as counsel or otherwise, appear before the State board of equalization for the purpose of having any inequalities corrected in their amounts fixed by that board for the purpose of taxation?

To which question plaintiff objected on the ground that it is not proper cross-examination, and witness is advised not to answer matters that are not pertinent to cross-examination.

A. No, I did not.

Q. 53. Do you know whether any of your clients, referring to the party complainant in this bill or in any other of the cases known as The National Bank Cases *vs.* Hubbard, treasurer, appeared before that board for the purpose of having any inequality or excessive valuations corrected or reduced?

To which question plaintiff objected as not cross-examination.

A. I do not see how I can answer that question of my own knowledge. I do not know.

340 Q. 54. Did you advise or counsel any of the parties plaintiff to these various actions whom you might have represented, to appear before said board, being the State board for equalizing bank values, and to seek to have that board correct any inequalities or excessive valuations upon the amounts returned for taxation?

To which question plaintiff objected as not cross-examination.

A. I do not think I am called upon to state what I advised my clients. I object to answer.

Q. 55. Your answer is, "I refuse to answer"?

A. I object to answer.

Q. 56. Do you refuse to answer because you were of attorneys for any of the parties in question?

A. My refusal is based upon my relations to the plaintiffs in this case.

Q. 57. Your refusal is based, is it not, upon the statutory privilege given you as an attorney testifying to confidential relations between attorney and client?

A. That would be adequate ground. There are several other grounds.

Q. 58. Do you assign that as one of the reasons?

A. Yes.

Redirect examination of NORTON T. HORR.

By Judge BOYNTON:

Q. 59. I forgot to ask you, Mr. Horr, what the comparison was—you made a comparison between the valuation put upon the shares of Cleveland banks and those put upon the shares of Cincinnati banks?

A. Yes.

Q. 60. Give the percentage of the Cincinnati banks.

To which question defendant objected.

A. I have already testified to percentages, and it appears on that table in that report that the aggregate national banks in Hamilton county are assessed at 54⅓ per cent. of their aggregate stock, surplus and undivided profits after deducting the assessed value of the real estate.

Q. 61. By the State board of equalization?

Objected to.

A. Yes.

AUGUST 22ND, 1898—2 p. m.

Parties met pursuant to adjournment and resumed the taking of depositions.

Present: W. W. Boynton, counsel; N. T. Horr and E. S. Cook, solicitors for complainants; Smith W. Bennett, assistant attorney general; P. H. Kaiser, solicitor for Cuyahoga county, Ohio, for respondents.

341

EDWIN R. PERKINS, a witness produced on behalf of said complainant, being duly sworn, deposes and says as follows:

Direct examination of EDWIN R. PERKINS.

By Judge BOYNTON:

Q. 1. What is your name, age and place of residence?

A. Edwin R. Perkins; age, 65; Wickliffe.

Q. 2. What, if any, stock did you own in the Mercantile National Bank of Cleveland, Ohio, on the day preceding the second Monday in April, 1897, and on the Wednesday next preceding the second Monday in May, 1897?

A. 530 shares.

Q. 3. What, if any, legal claims and demands, whether for money or other valuable things, or for labor or services due or to become due to you, including deposits in bank or with persons in or out of this State other than such as are money, did you own on that day?

A. None.

Q. 4. What, if any, legal *bona fide* debts did you owe on that day, leaving out of the account all obligations to any mutual-insurance company, all unpaid subscriptions for religious, scientific, literary or charitable purposes, all acknowledgments of indebtedness founded on some consideration not actually received or which you believed at the time of making such acknowledgment to be other than a safe consideration therefor, and all acknowledgments of indebtedness made for the purpose of diminishing the amount of your credits to be listed for taxation, and to whom did you owe them?

A. $32,500.

Q. 5. To whom?

A. $30,000 to the Society for Savings and $2,500 to Hannah Pelton, of Perry, New York.

Q. 6. Did you file or cause to be filed with the auditor of Cuyahoga county, Ohio, an affidavit and demand marked for identification Plaintiff's Exhibit Perkins and heretofore offered in evidence in this case, which purports to be signed by you? (Showing witness a paper-writing.)

A. Yes, that's my signature.

Q. 7. You may state whether you delivered that to the cashier of the Mercantile national bank to be delivered to the auditor.

A. I did.

342 Q. 8. You may state whether you are the executor of the estate of Truman P. Handy.

A. I am sole executor.

Q. 9. Are you familiar with the credits due him or obligations due him on the day preceding the second Monday in April, 1897, and on the Wednesday next preceding the second Monday in May, 1897?

A. I am.

Q. 10. And are you familiar with the amount of bank stock he owned at that time?

A. I am.

Q. 11. What was due him in legal obligations on that day in amount?

A. There was considerable due him, but those debts were of no value and had so been appraised by the appraisers appointed by the probate court.

Q. 12. The claims that he had due him at that time have been appraised as valueless?

A. Yes.

Q. 13. Did he have any others?
A. No.
Q. 14. What amount of stock did he own?
A. 400 shares in the Mercantile national bank.
Q. 15. What legal *bona fide* debts did he owe?
A. $86,000.
Q. 16. To whom did he owe that?
A. He owed $55,500 to the Mercantile national bank, $30,000 to the Society for Savings, and $5,000 to the Western reserve bank in this city.
Q. 17. And evidenced by what character of obligations?
A. Promissory notes. I think those to the Mercantile national bank were all demand notes.
Q. 18. Are you acquainted with his handwriting?
A. Yes.
Q. 19. You may state whether the affidavit put into your hand and marked for identification "Plaintiff's Exhibit Handy," and which has been heretofore offered in evidence in this case, bears his signature.
A. That is Truman P. Handy's signature.
Q. 20. That is the genuine signature of Truman P. Handy?
A. Yes.
Q. 21. You are the president of the Mercantile bank?
A. I am.
Q. 22. And were through 1897 and in April?
A. Yes.
343 Q. 23. What notice did the bank have, to your knowledge, of any of the meetings of the State board of equalization for bank shares in 1897?
A. None so far as I know.

Cross-examination of EDWIN R. PERKINS.

By Mr. KAISER:

Q. 24. What did you say, Mr. Perkins, was your indebtedness on the day before the second Monday of April, 1897?
A. $32,500.
Q. 25. How divided?
A. $30,000 to the Society for Savings, and $2,500 to Hannah Pelton.
Q. 26. Where does she live?
A. At Perry, New York.
Q. 27. Where did she then live?
A. She then lived there.
Q. 28. What credits were owing to you on that same date?
A. No credits.
Q. 29. You held no notes against any persons on that date?
A. No, sir.
Q. 30. No accounts against any persons?
A. No, sir.

Q. 31. How recently before that date had you held any credits against any person?

A. I should think not for three or four years.

Q. 32. No mortgages on any real property?

A. No.

Q. 33. Nor on personal property?

A. No.

Q. 34. When did you move to Wickliffe?

A. In 1891.

Q. 35. Did you have any moneys on the day in April to which your attention has been called?

To which question plaintiff objected as not cross-examination, and informed the witness that he need not answer the question unless he chose to do so.

A. I had no money in savings banks, and I have none subject to my credit in national banks, if so, I made return of it for taxation in the account there. I could not tell without looking. I had no idea I had any.

Q. 36. You were in what business in April, 1897?

A. In several kinds of business. My principal business is as manager of estates, and also I was then and am still president of the Mercantile national bank. I was then and am still treasurer
344 of the Cleveland and Mahoning Valley Railroad Company. I was and am still president of the Dubuque, Iowa, Water Works Company, and a director and member of the executive committee, and a good many corporations.

Q. 37. In April, 1897, aside from being executor of Mr. Handy's will, of what other estates were you either executor or administrator?

Plaintiff objected to said question on the ground that in April, 1897, Mr. Truman P. Handy was living.

A. I was trustee under the will of Selah Chamberlain.

At this point Judge Boynton, counsel for plaintiff advised witness not to answer this line of questions because the matter is not germane to the present issues.

Q. 38. Do you decline to answer or do you not?

A. I defer entirely to my counsel in the matter.

Q. 39. Being thus governed, what do you say? Do you decline to answer or not?

A. I would just as soon answer as not, but under the advice of counsel I decline to answer.

Q. 40. Have you any other reason for declining to answer than the one you have given?

A. No.

Q. 41. When did Mr. Handy die?

A. March 25, 1898.

Q. 42. How soon after his death did you qualify as executor?

A. Probably three or four days afterward, or four or five days.

Q. 43. Did you have the management of Mr. Handy's affairs prior to his death?

A. I did not.

Q. 44. How do you know what credits he had or did not have in April, 1897, while he was still living?

A. Thinking you might wish to be informed on that subject I took occasion to make an examination of his books, and I also know in a general way because he often conferred with me in respect to his estate for years, telling me what things he had and what his views were concerning them, advising me probably ten years ago that I would, if living, have the administration of his estate.

Q. 45. Could you tell from examining his books in 1898, what credits he had in 1897?

A. I could, yes. The same credits that existed in 1897 exist still in 1898, every last one of them.

Q. 46. How do you know that?

A. From my examination.

Q. 47. How could you tell that notes that he may have held in 1897 were paid off between April 1897, and the day of his death 1898?

345 A. Finding those notes all in his possession upon his decease was pretty fair evidence. The notes were described upon his books, giving the dates. I have verified those dates.

Q. 48. Do you intend, then, to say that whatever of notes were indicated as being in his possession in April, 1897, his books examined in 1898 show they are still outstanding and unpaid?

A. I do.

Q. 49. You have said that whatever credits Mr. Handy had were practically worthless. Is that a correct statement of what you said?

A. It is.

Q. 50. Please state against whom and in what sums Mr. Handy held obligations in 1897, as you ascertained by looking at this books in 1898?

A. He had due from the South Market Company, a corporation existing in the city of Minneapolis, debts as follows:

| | |
|---|---|
| A note dated Feb. 12, '94 | $500 00 |
| A note dated April 2, '94 | 2,078 29 |
| A note May 28, '95 | 595 28 |
| A note July 1, '94 | 10,966 12 |
| A note November 15, '95 | 845 83 |
| A note May 23, '96 | 1,101 97 |
| Making a total of | $16,087 49 |

He had also in a note that was dated later than that time, but for moneys advanced prior to that time on one-half interest in a second mortgage of this same company in the hands of H. P. Crowell, Chicago, $15,000. His books show this, and I have had communication once or twice, with Mr. Crowell since his death and Mr. Crowell verifies that. He had also a note of the Gardner Kane Co., dated

December 11th, 1896, $5,492.14, aggregating $36,519.63. This is all that was turned over to the appraisers. In addition there are rents and little due bills amounting probably to $4,000 in all running back over 40 years. They are to various people of no earthly responsibility, some of them. He marked his packages all bad and most of them dead. I didn't think it was worth while to bring you a list of those things today.

Q. 51. What was the name of that corporation you first mentioned?

A. The South Market Company, Minneapolis.

Q. 52. Is that a company in which you had any stock?

A. No, sir.

346 Q. 53. Is that a company of whose assets in 1897 you have any personal knowledge?

A. Only knowledge as derived from the owners of it, Mr. Handy and Mr. Crowell.

Q. 54. Direct personal knowledge you have none?

A. Direct personal knowledge I have none.

Q. 55. Do you know whether it is still a going concern?

A. Oh, yes.

Q. 56. Doing business?

A. Yes, in the same sorry condition today that it was then, as I was then advised.

By Judge BOYNTON:

Q. 57. Is the paper worthless?

A. Yes, and I am afraid worse than worthless.

Q. 58. Does the statement you have just made include all the credits so far as you know, owned and held by Mr. Handy in April 1897?

A. It does.

Q. 59. Please repeat again what on that date, so far as your knowledge goes was his indebtedness?

A. He owed $86,000 exactly. Of course, there was interest on it.

Q. 60. How much stock did he have?

A. 400 shares.

Q. 61. In which bank were these shares?

A. In the Mercantile national.

Q. 62. You spoke of an inventory and appraisal made after Mr. Handy's death of his estate. Did I understand you correctly when I understood you to say that the appraisers found that the credits to which you have testified and which are contained in the inventory, were practically of no value?

A. You will find that in the probate office as I have stated.

Q. 63. When was this inventory filed, if you remember?

A. It was filed—the day I cannot tell you—30 or 40 days ago along early in July.

Q. 64. On that inventory did these 400 shares of stock appear?

A. They did not. 240 shares appeared.

Q. 65. State the reason for the disappearance of the other?

A. The capital stock was in 1897 a million dollars, but reduced on the first day of April 1898, to $600,000, and the 400 shares as you can see would be reduced to 240 shares.

347 Q. 66. Were these shares that were returned in the inventory, appraised also by the appraisers?

A. I beg pardon, it was the whole 400. It was made earlier than this—the appraisal was made—the estate was appraised as it appears at the time of Mr. Handy's death, and the 400 shares were in.

Q. 67. Mr. Handy died the 25th of March, 1898?

A. Yes, that's right.

Q. 68. How soon afterward was the appraisal made and the inventory returned?

A. About 30 days after that. The inventory was not returned so soon as made by quite a little time.

Q. 69. On that inventory there appears the valuation of these shares of stock?

A. Yes.

Q. 70. Do you know whether there was any considerable change of the values of that kind of stock between April, 1897, and the date in 1898 when the inventory was returned?

A. Do you mean in real value of the shares?

Q. 71. Yes.

A. There was none.

Q. 72. Was there other national bank stock in that inventory aside from this one bank?

A. There was not.

SAMUEL E. WILLIAMSON, a witness produced in behalf of said complainant, being duly sworn, deposes and says as follows:

Direct examination.

By Judge BOYNTON:

Q. 1. Please state your name, age, and residence.

A. Samuel E. Williamson, 54, Cleveland, Ohio.

Q. 2. What if any stock did you own in the Mercantile National Bank of Cleveland on the day preceding the second Monday in April, 1897, and on the Wednesday next preceding the second Monday in May 1897?

A. There were 100 shares standing in my name, but only 50 were my own personal property. The others I have in trust for somebody else.

Q. 3. You owned 50 shares?

A. Yes, although there are 100 standing in my name.

Q. 4. How many in the Western Reserve national bank?

A. 100 shares.

Q. 5. And how many in the Commercial national bank?

A. 121 shares.

348 Q. 5. What if any legal claims and demands whether for money or other valuable things, or for labor or services due or to become due to you including deposits in banks or with

persons in or out of this State other than such as are money, did you own on that day?

A. Do you mean a statement, or simply the amount?

Q. 6. The amount first—I mean the amounts of other credits other than bank stock?

A. I think $8,000 would be all. This is in 1897 you are inquiring about.

Q. 7. What, if any, legal *bona fide* debts did you owe on that day, leaving out of the account all obligations to any mutual insurance company, all unpaid subscriptions for religious, scientific, literary or charitable purposes, all acknowledgments of indebtedness founded on some consideration not actually received or which you believed at the time of making such acknowledgment to be other than a safe consideration therefor, and all acknowledgments of indebtedness made for the purpose of diminishing the amount of your credits to be listed for taxation, and to whom did you owe them?

A. I owed as much as $60,000.

Q. 8. You may state to whom you owed most of it.

A. I owed the Society for Savings one debt of $18,000, another of $7,500, and I think another of $9,000. The Western Reserve Adelbert College I owed $15,000 and the Lakeside Hospital $5,000.

Q. 9. You may state if the affidavit which I now put into your hand under date of May 13, 1897, and which has already been introduced in evidence as Plaintiff's Exhibit Williamson, bears your signature?

A. Yes.

Q. 10. Did you file or cause to be filed with the auditor of Cuyahoga county, Ohio, this affidavit and demand which has already been offered in evidence as Plaintiff's Exhibit Williamson and which purports to be signed by you?

A. Yes, I caused one to be filed in case of each bank with the county auditor.

Q. 11. You may state whether the three I put into your hands are the ones?

A. Yes, the three you show me are the ones.

Cross-examination of SAMUEL E. WILLIAMSON.

By Mr. BENNETT:

Q. 12. At the time of the listing of your personal property for taxation inquired about in your examination-in-chief you
349 spoke of having 100 shares in your name of the Commercial national bank, and but 50 in your own out of the 100. For whom did you hold the other 50 shares as trustee?

A. My brother James D. Williamson.

Q. 13. Was that by any trust created by a court of record?

A. Not at all.

Q. 14. Was it by a private arrangement between you?

A. Simply a matter of convenience between us because I wanted to use it.

Q. 15. In what did the trust consist?

A. The stock I had subscribed for in my own name for myself and my two brothers when the bank was organized. My brothers paid two-thirds and I paid one-third, and J. D. and I bought out my other brother. So it always stood in my name.

Q. 16. In the report and list of stockholders of this bank you appear as the owner of the entire 100 shares, do you not?

A. I do.

Q. 17. Did you list the 50 shares as trustee under the statute, or did you list them individually as your property?

A. I didn't list them at all.

Q. 18. Did the cashier, so far as you are informed, list the 100 shares as your individual property, or list 50 shares of your individual property?

A. Only 50 shares of my individual property, because I claimed only 50 shares.

Q. 19. Where does your brother J. D. Williamson live?

A. On Cornell street, Cleveland.

Q. 20. What was the date that you spoke about having listed this property in your examination-in-chief?

A. April or May, 1897. That is, I didn't list it at all. I merely made the affidavit in reference to taxation.

Q. 21. And that affidavit is the one referred to by Judge Boynton and handed to you in your examination-in-chief?

A. Yes.

Q. 22. State what valuation you placed upon the 50 shares or upon any of the shares of stock in the Mercantile national bank in April 1897, or what valuation was placed upon that in the markets of Cleveland at that time?

To which question plaintiff objected as impertinent to the issues, and plaintiff's counsel advised witness not to answer the question.

350 A. I have no objections personally to answer. I did not place any valuation upon it as I remember now. My debts were so much in excess of all the credits and stocks I owned in national banks that it didn't make any difference to me what value the auditor of the board of equalization put upon it, because my debts were so much more. I think the stock itself was valued in the market somewhere in the neighborhood from 130 to 135. I know of no sales. Nothing farther than quotations.

Plaintiff objected to the last statement in the answer about quotations.

Q. 23. In your opinion then you would give that as the fair value of such stock in the month of April 1897?

Same objection by plaintiff.

A. No, I would not. I don't think it was worth any such amount from my knowledge of the matter since and what I knew at that time. I knew there were a great many assets that they were carrying, which, if they had been actually valued at what they were worth, would have reduced their assets; and in fact it is shown since

by the face that they have paid back at par $\frac{4}{10}$ of their capital stock, and the stock that is left is as high as the stock before they paid back the par 140 per cent.

Q. 24. Do you know what that stock is now quoted at in the markets of Cleveland?

To which question plaintiff objected as not germane to the inquiry, and counsel advised witness not to answer the question.

A. I decline to answer under the advice of counsel.

Q. 25. Was it not quoted May 3rd, 1897, as follows: Mercantile national bank 135, bid 135, asked 136?

Same objection, by plaintiff.

A. I don't know.

Q. 26. When you say Judge Williamson, that your debts were far in excess of your credits, do you place among your credits the bank stock in question?

A. Yes.

Q. 27. Then to determine whether your debts are in excess of your credits, what valuation did you place upon this particular part of your credits, namely your stock in the Mercantile national bank?

A. I didn't place any particular value on it. I knew whatever value anybody placed on it, I still owed more than all my credits, including the national bank stock.

Q. 28. Would you then in that estimate place the hundred shares of national bank stock, or rather the 50 shares, at 135?

A. If you placed it at 150, the conclusion is the same as far as I am concerned. If it was worth 200 I would still owe debts enough to cover it.

351 Q. 29. I don't care to place it at all. I want your valuation of it.

A. I didn't testify from value. I simply figured that if it was worth 150, I still owed enough to cover all my credits including national bank stock.

Q. 30. Did you figure in the 100 shares in the Reserve national bank as part of your credits?

A. Yes.

Q. 31. What was that stock worth in April 1897?

A. I don't know.

Q. 32. How do you know that your debts exceeded your credits so greatly?

A. I know it wasn't worth 150.

Q. 33. Was it worth 130?

A. No, I don't think it was.

Q. 34. Was it not in fact bid in Cleveland, Ohio, on May 3rd, 1897, 129 for that stock?

A. I don't know.

Q. 35. In estimating how you arrived at your excess of debts over credits, what valuation did you place upon the Western Reserve National Bank stock?

A. I didn't place any particular valuation on it.

Q. 36. Did you place any valuation on it?

A. No, not any valuation. I figured if it was worth 150 I still owed so much I had enough to cover all my credits in the national banks. It wasn't necessary to figure it out so fine.

Q. 37. Shall I place this stock as high as 150 in April 1897?

A. I can't imagine anything that would be farther from the truth than that would be.

Q. 38. I ask you to place a valuation on it at that time, either 150 or less?

A. I don't know enough to place a valuation on it.

Q. 39. What valuation did you place on the stock of the Commercial national bank in April 1897?

A. I treated that exactly as I did the other stocks.

Q. 40. Was it not worth in the market of Cleveland, or was there not asked for it, 125?

A. I should presume they would ask that for it.

Q. 41. Was there not bid for it on the third day of May 1897, 124?

A. I don't know what was bid for it any particular day. I could not say about that.

Q. 42. Now there were the 50 shares in the Mercantile national bank and 100 shares in the Western Reserve national bank, and 121 shares in the Commercial national bank, which all were used by you to augment your credits, were they not?

352 A. They were treated as part of my credits.

Q. 43. Can you state to the court what valuation you placed on that amount of bank stock?

A. I cannot say any more than I have said.

Q. 44. Can you state in the aggregate what valuation you placed upon it?

A. No, I can't state that, because I don't think I placed any particular valuation on it.

Q. 45. I don't mean your valuation in any return. I mean your valuation that you might have placed upon it in determining that your debts were in excess of your credits?

A. I didn't place any particular valuation upon it for that purpose, as I have said. I knew if it were fixed half again as much as its par value, I still owed so much of debts they were more than my credits.

Q. 46. What interest, if any, can you state, or what dividends, were paid on the Mercantile National Bank stock during 1897?

A. 6 per cent. on par.

Q. 47. What interest was paid or what dividends were paid on the stock of the Western Reserve national?

A. 6 per cent. on par.

Q. 48. What dividends were paid on the Commercial National stock?

A. 6 per cent. on par.

Q. 49. This refers to 1897?

A. Yes.

Q. 50. You have given among your other credits $8,000 in April, 1897. Will you state what these credits consisted of?

A. They did not exceed $8,000, as my recollection serves me now. I think I had a mortgage indebtedness of a little less than $3,000 and another one of $3,500, and perhaps $300 in the Society for Savings. I don't remember anything else now.

Q. 51. Did you say these were debts or credits?

A. Credits. That's what you asked me.

Q. 52. Yes, credits; and these were represented by mortgages, were they?

A. Yes, of course, it is a little difficult for me to remember.

Q. 53. What was the value of this $3,000 mortgage?

A. It's worth all it calls for.

Q. 54. Was it paid?

A. No.

Q. 55. Is it still a credit?

353 A. Yes.

Q. 56. Who is that against?

A. It's against a man named Reuben Straus.

Q. 57. Where does the real estate upon which it is a lien lie?

A. It lies down on Superior Street hill in this city.

Q. 58. The other mortgage you gave on $3,500?

A. Yes, I think that was outstanding at that time.

Q. 59. Whom was that against?

A. A man by the name of Bandlow.

Q. 60. Was it assigned to you, or were you in it as a mortgagee?

A. It was assigned to me.

Q. 61. Whom by?

A. Felix Nicola, I think.

Q. 62. That would make $6,500. Has that been paid, that $3,500?

A. Well I have taken a loan, if that makes payment.

Q. 63. When?

A. I think it was some time in 1897. That's the reason I put it in.

Q. 64. What other credits had you at that time?

A. I think I had about $300 in the society deposit, that's all I at the present time recollect. I have one or two others that are worthless.

Q. 65. Have you a register kept by you of your bills receivable covering the month of April, 1897?

A. Yes.

Q. 66. Will you produce it?

A. Why, yes, if you like. I haven't got it here.

Q. 67. Have you accounts, or did you have in April, 1897, for professional services or otherwise that were unpaid?

A. Well, I presume I did, but if they were unpaid, they were entirely unsettled. I don't keep books enough to know what they are.

Q. 68. I mean accounts that were unpaid, credits in your favor. Please give an estimate of those, if any existed in your favor in April, 1897?

A. Possibly $4,000 or $5,000.

Q. 69. You say you made an affidavit of the amount of your indebtedness in April, 1897, which was filed with the county auditor by the cashiers of these various banks?

A. No, I said I signed affidavits that were shown to me. But that's not all I owe. I owed even more than I have spoken of today.

Q. 70. I see that you have used in each of the three affi-
354 davits made—in the Mercantile national bank, the Western Reserve national bank and the Commercial national bank, the same amount of indebtedness of $40,000 to offset the value of your bank stock in the three banks referred to. State again, will you, to whom or to what corporations this indebtedness was owing at that time?

A. I owed $18,000 on one note to the Society for Savings.

Q. 71. Was that your paper or were you surety on the note?

A. It was my paper with my two brothers.

Q. 72. Were you the principal of that $18,000 note or merely surety?

A. The note was $30,000, but my indebtedness on it with them was $18,000—my part of it.

Q. 73. When was that given?

A. Years and years ago, ten years ago, I guess.

Q. 74. What was the original amount of it?

A. $30,000.

Q. 75. Was none of it paid during the ten years of its existence up to 1897?

A. No, it is not paid yet.

Q. 76. Did that represent money borrowed of the Society for Savings?

A. Yes.

Q. 77. What was that money invested in?

To which question plaintiff objected.

A. $18,000 was invested in building and loan with my brothers, and $12,000 of it was invested by one of my brothers in foundry property in Chicago. It was more convenient to lock the indebtedness in one note secured by one piece of property.

Q. 78. Was the $7,500 note—what does it represent? Borrowed money?

A. Yes.

Q. 79. What was the date of that?

A. I should think some time in 1895 or 1896.

Q. 80. What was that used for, Judge?

A. It was part of the purchase-money in some property next to my house on Euclid avenue that my neighbors and myself bought.

Q. 81. Does that remain unpaid?

A. I am sorry to say it does.

Q. 82. Was there any collateral deposited with that to secure the payment of the same?

A. It was secured by a mortgage on the property.

Q. 83. The $9,000 that you say you owed the Society for Savings, when was that given?

355 A. I am a little bit off. It was given at the same time—most of it. The note was given about the same time. The note was given at the same time.

Q. 84. In 1895 or 1896?

A. Yes, the same time that the $7,500 was.

Q. 85. What was that invested in?

A. In this same purchase of land on Euclid avenue that we bought to protect ourselves, which land we would be very glad to sell.

Q. 86. What does this loan of the Western Reserve Adelbert college represent?

A. It represents borrowed money.

Q. 87. It is evidenced by a promissory note?

A. Yes.

Q. 88. Whom is that note signed by?

A. Myself.

Q. 89. Individually.

A. Yes, $5,000 of it has been paid since, but the note is $15,000.

Q. 90. Since when?

A. Since May, 1897, I think.

Q. 91. Can you give the date of that loan?

A. I can't. It was several years ago.

Q. 92. This note to Lakeside hospital of $5,000, can you give the date?

A. That was four or five years ago.

Q. 93. Was it still unpaid in April, 1897?

A. Yes, it is unpaid yet.

Q. 94. Has any part of it been paid?

A. No, the debt is bigger now than it was then.

Q. 95. Was there any other indebtedness that you wished to add to this as part of your evidence, that was owing by you in April, 1897?

A. I don't remember now that there is any.

Q. 96. This 50 shares in the Mercantile national bank as trustee, I understand you returned that?

A. I only claim 50 of it. I left the other 50 for the bank to return, which they probably did.

Under date of August 30, 1898, Samuel E. Williamson testified further as follows:

I would like to correct a mistake I made in my testimony the other day. I don't know as it makes any difference in the

356 record, but I would rather be accurate. I stated, I think, that I owed a note of $9,000 to the Society for Savings, and one of $15,000 to Adelbert college. I find on examination of my books that I have made a change in that in March, 1897, so that on the first of April I had taken up the $9,000 note, which was in fact only $6,000 and made a note for $32,000 to the Society for Savings, and I paid out of it, I think, $5,000 on the Adelbert College note.

By Judge BOYNTON:

Q. That would leave $10,000 due the Adelbert college?
A. Yes, and the loan of $9,000 was only the loan of $6,100. My indebtedness at that time was one note of $30,000 to the Society for Savings.

Mercantile National Bank, 187. Heading, 183.

THOMAS H. WILSON, a witness produced in behalf of said complainant, being duly sworn, deposes and says as follows:

Direct examination.

By Mr. HORR:

Q. 1. Please state your name, age and place of residence?
A. Thomas H. Wilson, age 56, Cleveland.
Q. 2. You are the cashier of the First national bank?
A. Yes.
Q. 3. And you were in the year 1897?
A. Yes.
Q. 4. You may state whether you were a member of the committee appointed by the various national banks of the city of Cleveland to visit the auditor of State and the attorney general and the governor during the month of December last, after you had learned that the valuation of your shares had been increased by the State board of equalization?
A. I was not.
Q. 5. Were you present at a meeting of the committee composed of several of the cashiers of national banks in this city with the auditor of State and the attorney general during the month of December, 1897, at Columbus?
A. No.

By Judge BOYNTON: It appearing that the witness was not present at the meeting of the committee referred to in the above inquiry, his testimony in this case is entirely withdrawn by the plaintiff.

To which attempt to withdraw the testimony defendant objected.

357 Cross-examination of THOMAS H. WILSON.

By Mr. BENNETT:

Q. 6. I desire to inquire if you ever appeared before the board for the equalization of bank shares during the year 1897 on behalf of the First national bank, to seek to have the valuation placed upon said bank shares by that board reduced in value or otherwise equalized?
A. Yes.
Q. 7. When?
A. I can't recall the exact date. I suppose it is a matter of record somewhere.
Q. 8. Did you there on behalf of said First national bank make

any complaint and seek to have said board equalize the value of said shares?

A. I asked them to deduct off what they had put on, the entire amount.

Q. 9. How did you receive notice that they had put on any amount if at all?

A. Only through the county auditor. We had no notice till after it was done.

Q. 10. You appeared there on behalf of said bank after the addition was placed to your return, did you not, by the State board?

A. I don't know. It was pretty near the end of the tax-paying period. It must have been pretty close to the 15th of December.

Q. 11. It was after the action of the board in placing this addition to the values as fixed by the bank and returned to the county auditor?

A. Oh, sure.

Q. 12. And it was after you had received notice from the county auditor of the increase in that bank's valuation?

A. I should say so, most certainly.

Q. 13. Then what did you seek to have them do? State to the court just what took place.

A. I asked them to take off the entire increase of the bank. What further do you want as to what took place?

Q. 14. Did you there file any complaint with said board?

A. Not with them.

Q. 15. Did you introduce any testimony?

A. Well, I don't know whether you would call it testimony or not. I made a statement. I don't know whether they were sitting as a State board or not, they didn't say.

Q. 16. The State board were present?

358 A. There was the attorney general, and the auditor, and the governor.

Q. 17. After they failed, refused or neglected to do what you had asked them to do, what, if anything, further did you do with regard to their judgment in the matter?

A. We have done nothing since. I wrote to them declining to accept their reduction; that we would stand on our legal rights.

Q. 18. When you say "accept their reduction," to what do you refer?

A. They made a deduction on the strength of my statement.

Q. 19. Tell us how much of a deduction.

A. I cannot tell you now. I have no figures with me. I don't know whether I have any record of it or not.

Q. 20. Did they make a deduction upon any other bank than the First national?

A. That I could not tell you.

Q. 21. Did you keep a copy of your letter or notice to them? You say you wrote to them?

A. I ought to have a copy of it. I cannot say right here whether I have or not.

Q. 22. Then, immediately after that you began this action in which this testimony is being taken, did you not?

A. The action may have been begun before, I cannot say.

Q. 23. What was the date of your letter to the board?

A. I cannot tell you.

Q. 24. How long was it after you were there on the 15th and gave your statement?

A. You mean how soon did the board—if it was a board—take action?

Q. 25. How long after you were there and gave your statement to the board did you write them this letter, declining to accept their deduction?

A. Not till I had received word from them through the auditor of the county.

Q. 26. When was that?

A. I don't know. Some time had elapsed. They took plenty of time.

Q. 27. Was it a couple of weeks?

A. More than that.

Q. 28. Haven't you somewhere a letter from the auditor of this county notifying you of the action of that board?

A. We may have.

359 Q. 29. Can you definitely fix the date of your letter to said board, the date on which you gave them notice that you refused to accept their deduction?

A. As I have said, if I had a copy of my letter, that will fix it beyond all doubt.

Q. 30. Will you please look that up?

A. I hope to go away this afternoon. I should think it was between the 5th and 10th of January. It might be later. I think it was about the limit of the tax-paying period. We will say the 5th of January to be on safe ground.

Q. 31. Do you know whether the bank had paid its taxes before you sent that letter back, notifying the board for the equalization of bank values that you would not accept their deduction?

A. I should guess we hadn't paid. I would say it was a little before.

Q. 32. Taxes were not paid as a matter of fact till after this action was begun to have the collection of the increased amount enjoined, is not that the fact?

A. I don't remember now.

Redirect examination of THOMAS H. WILSON.

By Judge BOYNTON:

Q. 34. When did your bank, or yourself as cashier first obtain notice that the State board of equalization at Columbus had increased the valuation of your assessment fixed by the auditor?

A. I should say it was some place between the 8th and 15th of December.

Q. 35. You may state if you or any member of your bank to your knowledge had any notice of the days on which the board of equal-

ization for banks, met at Columbus, after the day fixed by the statute in June?

To which question defendant objected.

A. None whatever.

Q. 36. Did you, prior to the 7th day of December, 1897, have any notice of any meeting of the board of equalization at Columbus concerning any action to be taken by them in relation to your bank?

To which question defendant objected for the reason that the witness appeared there without notice.

A. None whatever.

Q. 37. Did you have any conversation with the members of the board when you went there in December, after you had learned of the increase of the valuation of your bank property—with the
360 members of the board as a board of equalization—or as to whether they had previously adjourned *sine die?*

To which question defendant objected.

A. I did not ask them the question as to whether they were sitting as a board or not. That subject was not canvassed.

Q. 38. You may state if you made a statement to the auditor, to the attorney general and the governor, in relation to the report made by you to the Comptroller of the Currency for 1897, and the report made by you to the auditor of Cuyahoga county that year. Or, if any inquiries were made by any member of the board?

A. Yes, they inquired of me in regard to that.

Q. 39. Did you make a statement concerning the report made by you to the Comptroller of the Currency?

A. They had a copy of the report to the Comptroller of the Currency there.

Q. 40. What inquiry, if any, did they make of you relative to the difference in the valuation appearing in the report to the Comptroller of the Currency and that made to the auditor of Cuyahoga county for taxation?

A. I think the attorney general asked me to explain why our surplus should be so much less in one than the other.

Q. 41. What was your reply?

A. My reply was that we carried on our books $80,000 real estate which had an assessed valuation of $35,300. I am stating these things from memory, I may be wide as to a dollar or two—and that we had, perhaps, $75,000 of paper, bills receivable, which our board would sell to any member of that board for $25,000. These may not be the exact figures, but it will illustrate.

Q. 42. What did you say to them as to these two items, the real-estate item at $80,000 and these doubtful bills receivable at $75,000, having gone into the report to the Comptroller of the Currency at these respective figures?

A. I don't know that I said anything particular.

Q. 43. You may state whether or not they did go into the report to the Comptroller of the Currency at these figures?

A. Yes. That's the statement to the comptroller.

Q. 44. What did your real estate go into the duplicate at?

To which question defendant objected.

A. I think $33,300.

Q. 45. And what did you do in reference to your statement to the auditor about your $75,000 bills receivable that you said you would sell for $25,000?

361 A. Scaled them down to that figure.

Q. 46. You may state whether or not that explains the difference between your report to the auditor of Cuyahoga county and your report to the Comptroller of the Currency.

A. That is one of the two large items in the deduction. I also deducted the unearned interest of about two-thirds of our bill.

Q. 47. You mean in your report to the auditor?

A. Yes.

Q. 48. How did that appear in the comptroller's report?

A. It goes in at face.

Q. 49. And the unearned interest, the bank, of course, did not enter at that time?

A. No.

Q. 50. You may state whether you were notified by any member of the board that in consequence of your statement explaining the difference between the two reports they would make a deduction of the increase previously made to the valuation of your bank shares.

To which question defendant objected.

A. The State auditor, I think, wrote to the county auditor that the deductions for poor paper were allowed. The deductions which I claimed for the difference in the valuation of the real estate was not allowed; nor do I think they allowed us the deduction claimed for unearned interest.

Recross-examination of THOMAS H. WILSON.

By Mr. BENNETT:

Q. 51. Can you now give from memory the amount of your return in the year 1897 for said bank to the county auditor?

A. I think we returned for taxation a little less than $510,000; but I may be in error.

Q. 52. Can you give from memory the total reported to the Comptroller of the Currency the same month?

A. I think that was less than $610,000 of capital and surplus. I did not return anything for taxation to the Comptroller of the Currency.

Q. 53. Is not the amount reported to the Comptroller of the Currency by the First national bank, as required by the form furnished by the Comptroller of the Currency, $608,400?

A. Was that the amount?

Q. 54. I think so.

A. I thought it was a little less than $610,000. I can only give you approximate figures.

362 Q. 55. Is the real estate included in that valuation in the report to the Comptroller of the Currency?

A. It is returned there at $80,000.

Q. 56. Your capital stock at that time paid in was $500,000, was it not?

A. Yes.

Q. 57. Your surplus fund was $100,000, was it not?

A. Yes.

Q. 58. Your undivided profits, less expenses and taxes paid was $8,412, was it not?

A. Yes. I am assuming that you are reading from the report.

Q. 59. Now, for the purposes of taxation, did you deduct from that the value of the real estate?

A. I returned the real estate at its assessed value, just what the State and county say it is worth.

Q. 60. And you say that amount, with the amount of your bad paper and unearned interest, accounted for the difference between the report made to the Comptroller of the Currency and the return made to the county auditor?

A. Yes.

Q. 61. The board for the equalization of bank values, at the time that you were present, had before them the report that you had also made to the Comptroller of the Currency?

A. Yes.

Q. 62. And that report made to the Comptroller of the Currency was affixed to your return for taxation, and sent to the county auditor?

A. I could not say as to that.

Q. 63. Did not the form on which you made out the report of the First national bank in the year 1897, require that you append to that your last report made prior to that, to the Comptroller of the Currency?

A. I am not sure whether it does or not. It will appear on the form if so required.

Q. 64. And if it was required, you complied with that and appended to your return a copy of the statement which you had forwarded to the Comptroller of the Currency?

A. I cannot say whether I did or not, but it was pinned to our return down there.

Q. 65. Was it not a practice complied with by yourself of cutting out a printed report from the paper, a printed copy of your report to the Comptroller of the Currency, and just attaching that to your return for taxation?

A. I don't think I ever did it. I cannot remember that I
363 ever did. I don't believe I ever did. I believe there was a copy down at Columbus that somebody else pinned on.

Q. 66. At this time that the conversation occurred between you and the attorney general relative to the difference between the re-

port to the Comptroller of the Currency and your report for taxation, state whether or not that conversation and that appearance by yourself was after you had received notice of the board's action through the auditor of this county.

A. I should say it must have been.

Q. 67. I will ask you the question as to the true value in money of the stock of the First national bank at any time between the day preceding the second Monday of April and the second Monday of May, 1897?

To which question plaintiff objected as not proper cross-examination.

A. What do you mean by "true value?"

Q. 68. I submit to you.

A. Do you mean the selling value? I would say it was worth par, from par to 105.

Q. 69. Was there at that time any usual selling price for said stock?

A. We have had very few transfers of our stock in the last two or three years.

Q. 70. Was it because nobody wanted it, or because it was so good that nobody wanted to part with it?

A. I infer nobody wants it.

Q. 71. If there was no usual selling price, what amount, in your best judgment, could have been obtained therefor in money?

To which question plaintiff objected.

A. I think it would have sold for 115 or 120.

Q. 72. As a matter of fact, do you not know that on the third day of May, 1897, First National Bank stock in this market was bid 125 and asked 127?

A. No.

Redirect examination of THOMAS H. WILSON.

By Mr. BOYNTON:

Q. 73. What dividends has your bank declared during the last ten years?

A. We have passed two or three dividends, and made dividends at 4 per cent. yearly, and at 6 per cent.

Q. 74. How many years at 4, and what year?

A. I think perhaps 1889 and 1890.

Q. 75. Have you paid more than 6 per cent. any year?

A. Never since my connection with the bank.

Q. 76. How long have you been connected with it?

A. Since 1888.

364 Q. 77. Sometimes 4 per cent. yearly, and sometimes 6?

A. Yes, and sometimes none at all.

Q. 78. Is it you is it (*sic*) not true that banking during the last two or three years has not paid as well as in former time?

To which question defendant objected.

A. It has been very hard to earn a dividend for the last 5 years. I am speaking now of ourselves.

Q. 79. Does that circumstance affect the true value in money of bank stock?

A. It does to my mind.

Q. 80. You may state whether or not, in your judgment, 115 or 120 a share, which you say possibly might have been realized for it, represents the actual value of the shares of stock as a moneyed investment.

A. It is beyond the actual value. The bank could not liquidate at that. They could not pay 120.

Q. 81. What percentage of the par value, in your judgment, would the bank assets sell for, or would it have sold for in 1897, if you had offered them all in the market for sale, good, bad and indifferent?

To which question defendant objected.

A. I did not make any claim for deduction on general depreciation, but I believe that any bank in selling out could afford to discount on what are called good assets one or two per cent. anyway, aside from the unearned interest.

Q. 82. In selling out the whole concern?

Recross-examination of THOMAS H. WILSON.

By Mr. BENNETT:

Q. 83. I would like to know the amount that the board said they would reduce your tax.

A. They allowed our bad paper, and I think that is all. They rejected the claim for unearned interest and the difference in the valuation of the real estate.

Q. 84. And that proposition you rejected?

A. Yes, we declined to accept it.

Mercantile Bank.

J. J. SULLIVAN, a witness produced in behalf of said complainants, being duly sworn, deposes and says as follows:

Direct examination.

By Mr. BOYNTON:

Q. 1. Please state your name, age and place of residence.

365 A. J. J. Sullivan; age, 53; Cleveland.

Q. 2. You may state whether you were appointed by the clearing-house at Cleveland as a member of the committee to visit the governor, the auditor of State and the attorney general in December, 1897, with reference to the increase of valuation made by the State board of equalization of bank shares.

A. Yes.

Q. 3. You may state when, as cashier or otherwise, of the Central national bank, you first learned of the increase made by the State

board of equalization of the valuation fixed by the auditor to the bank shares.

A. That information was brought to me by a letter received from the county auditor.

Q. 4. Do you remember about the date?

A. About the 7th of December.

Q. 5. What information had you before that time of any action of the board of equalization?

A. Absolutely no information whatever.

Q. 6. What information had you of any meeting of the board of equalization prior to that?

A. No information whatever.

Q. 7. What information had you that any complaints had been made by the board of equalization for bank shares at Columbus that the valuation fixed by the auditor was not right?

A. I had no information at all on that point.

Q. 8. I understand you were on the committee that went to Columbus?

A. Yes.

Q. 9. Do you remember about the time you went?

A. I think about the 28th or 29th of September. I have a telegram from the governor fixing the date about the 22nd of September, but some members of the board who were away on leave of absence had not returned, and the meeting was postponed till a later date.

Q. 10. At that later date you gentlemen went?

A. Yes.

Q. 11. Whom did you meet?

A. We met the governor and the attorney general and the auditor of State.

Q. 12. What did those gentlemen or either of them say to you about hearing your complaints of the increase of valuation, as a board of equalization?

A. They said that the board of equalization had adjourned finally and we could have no hearing.

366 Q. 13. What conversation did you or any member of your committee have with the board, or any member of the board, in relation to the difference in the valuation of bank property as given by the report to the Comptroller of the Currency, and the statement made to the auditor? Give us the history of what transpired there on that subject, what was said by you and what was said by them.

A. The conversation was an informal one. I explained to them for our own bank the cause of the difference between our statement to the Comptroller of the Currency and that made to the county auditor.

Q. 14. Give us what you said in substance.

A. I said we deducted from our notes and bills 3 per cent. for bad and doubtful notes.

Q. 15. In your statement to whom?

A. To the county auditor——

Q. 16. What did you say to them about the report to the Comptroller of the Currency?

A. That that had in it a transcript of our books, literally embodying bad and good debts.

Q. 17. Now, I wish you would state here what you have stated before in reference to what is placed before you when you make your return to the Comptroller of the Currency. First let me ask you whether, before you went into the banking business, you were an examiner of national banks?

A. Yes.

Q. 18. How long?

A. Two and a half years.

Q. 19. Under whose administration?

A. Under the Cleveland and under the Harrison administration.

Q. 20. And are familiar with the mode of bank examining?

A. Yes.

Q. 21. What did you say went into the report to the Comptroller of the Currency?

A. The report to the Comptroller of the Currency is made on blank forms furnished by the comptroller's office, and these forms require a detailed statement of all the assets of the bank as they appear on the books of the bank on a day three or four days prior to the notification from the Comptroller of the Currency that the statement is required. Along with the general statement, bank managers making up their statement are required to give in detail, along with the notes and bills of the bank, the bonds on hand, how the bank got them, whether by purchase or taken on a debt, as also stocks of other banks or other corporations which they might have in their possession.

367 Q. 22. You may state whether or not the report made by your bank in the year 1897 embraced these requirements.

A. Yes.

Q. 23. And whether or not the exhibits there made embraced your good and bad debts together?

A. Yes.

Q. 24. Have you a blank that you could furnish for use, that contains the report made to the Comptroller of the Currency?

A. For use of what?

Q. 25. For use of this deposition?

A. I have retained a copy.

Q. 26. Will you send us one?

A. Yes.

Q. 27. Can you give us a copy of the May report of 1897?

A. I think I can.

Q. 28. I understand you, then, to say that the difference between the report made to the auditor for taxation and to the Comptroller of the Currency is the fact that one includes all debts and the other excludes them?

A. That accounts wholly for the difference, the bad or doubtful debts.

Q. 29. You may state whether or not these facts claimed by you relative to this difference were laid before the governor and the auditor and the attorney general in the interview of the committee with them in the latter part of December, 1897?

A. Yes, and the same statements made to the governor and attorney general and auditor of State in the latter part of December, 1897, were made in substance to the State board of equalization in about June, 1896, and they were accepted by the State board of equalization at that time as being true, and the State board accepted the statement of the banks as made to the county auditor literally in 1896.

Defendant objected to this last answer.

Q. 30. Your committee represented all the national banks of the city?

A. Yes.

Q. 31. Were these statements made by you to the members of the board of equalization in behalf of all the banks?

A. Yes.

Cross-examination of J. J. SULLIVAN.

By Mr. BENNETT:

368 Q. 32. Referring first to the reports made to the Comptroller of the Currency inquired of by Judge Boynton, permit me to inquire of the reports required of national banks by the Comptroller of the Currency are not required to be published in the form as made to the Comptroller of the Currency, so as to show the resources and liabilities of the various national banks at the time they are made?

To which question plaintiff objected because it is an inquiry concerning a matter of law.

A. There are two forms that are sent to national banks when a call for a statement of the bank's condition is made; one form is in brief providing for publication. That statement that is published is required to be certified to by the publisher as having appeared in his paper under such a date. That certificate of the publisher, with the statement as printed, is attached to the statement furnished by the bank to the publisher. Along with that there is another statement containing identically what appears in the published statement, and much more. This is the form that we retain. Each of these forms are sent in duplicate. One form is filled out by the bank for publication and the other is filled out to be returned to the comptroller along with the published statement. In the form which accompanies the printed form there are provisions for going into detail at great length. That shows the bad and doubtful debts, the list of directors and officers, and gives us all the minutiæ pertaining to the bank's condition to a much greater degree than appears in the published statement. There is where you gentlemen made the mistake, in being governed wholly by this matter which appears in the paper or in this book—this Financial Review.

Q. 33. You have given the report which is not published as required by the Comptroller of the Currency, and that which is published. These reports are made by you and by all cashiers on forms provided by the Comptroller of the Currency?

A. Yes, that's what I said.

Q. 34. And verified by the oath or affirmation of the cashier of the bank?

A. Yes, and attested by three directors of the bank.

Q. 35. And these reports are made at least five times a year?

A. Yes.

Q. 36. The report that is published truly exhibits the resources and liabilities of the association at the close of business on any passed day specified by the comptroller, does it not?

369 A. As they appear on the books of the bank.

Q. 37. And they are supposed to be and are actual and exact transcript of the books of the bank?

A. They are supposed to be.

Q. 38. With regard to the matter that is not published, that pertains to the indebtedness of the individual directors and their indebtedness to the bank and other secret matters which the governor does not require to be published along with the other report, is that not true?

A. Yes, that's right.

Q. 39. But the report as published is meant to exhibit the resources of the association on any given day?

A. As they appear on the books of the company.

Q. 40. These reports thus exhibiting the resources and liabilities of the association must be printed in some newspaper in the locality, published in the locality or the place where said association is established?

A. Yes.

Q. 41. And it was such a report that you have had in your hands and to which you have referred during this testimony?

A. What do you mean by saying I had it in my hands?

Q. 42. That Financial Review (referring to "Akins' Exhibit B" attached to the deposition of Auditor Akins).

A. I don't think you make that very clear. This Financial Review is simply printed by a young man here for distribution to make money out of.

Q. 43. That publication of the Financial Review is a transcript of the reports made to the Comptroller of the Currency at the various times in which they are said to have been made, namely in May, 1897.

A. As taken from the newspapers of the city. They do not get this from the bank. They get it from the newspapers.

Q. 44. It was one of these published reports to the Comptroller of the Currency that the board for the equalization of bank values, consisting of the governor, the auditor of State and the attorney general had before them at the time you were present with the balance of the committee, was it not?

A. I could not say as to that.

Q. 45. Did you examine the report to the Comptroller of the Currency that they then had before them?

A. As a matter of fact this is not the report to the Comptroller of the Currency. This is simply a transcript from the newspapers published in the towns—this Financial Review.

370 Q. 46. You have heretofore stated in your examination-in-chief that the board of equalization had before them a copy of the report of your bank and the other banks as made to the Comptroller of the Currency, and concerning which they asked you to make some explanation with regard to the difference between said report and the return made for taxation by each of the banks, did you not?

A. As a matter of fact we were not informed that we had met the board of equalization at all in December last. When our committee appeared before the governor, the auditor of State and the attorney general in December last, we appeared there not through an invitation from the gentlemen, but as a result of an arrangement made by me with the governor to have a meeting with the State board of equalization. We were not asked to explain the difference between our reports, but we did explain at length. After the explanation we were given to understand that the State board of equalization had adjourned some months previous, and that our only recourse was before a board of revision, as they called it, or abatement.

Q. 47. Did the board or the three gentlemen referred to request you to make an explanation of why your returned for taxation differed from your report to the Comptroller of the Currency?

A. My recollection is we were not requested to do so, but we were simply permitted through courtesy to make an explanation.

Q. 48. I will ask you whether you did make an explanation?

A. Yes.

Q. 49. When you made that explanation, did you have before you and did those gentlemen have present with them the report of the Comptroller of the Currency purporting to have been made by yourself as cashier?

A. My recollection is that during our conversation a Mr. Taylor, a clerk in the auditor's office, brought to the office a copy of this Financial Review, and submitted it to the governor, and as each of us talked about our respective banks, the governor turned to the statement of our respective banks as they appear in this Financial Review and compared this statement with the statement which we had made to the county auditor, and then I explained the causes of the difference in the figures.

Q. 50. And this was at the time you and the balance of the committee were before the board or the three gentlem-n, representing the national banks of Cleveland?

A. We were given to understand that it was not a board. It was at that time.

371 Q. 51. I characterize them as a unit instead of giving the three names of the gentlemen. You have said that you received a telegram from the governor of Ohio as to when you could be heard with regard to your bank values, have you not?

A. Yes.

Q. 52. Have you a copy of that telegram?

A. I have the telegram, but it is at my home.

Q. 53. Without requiring you, unless counsel for plaintiff objects, I would ask you to state the substance of the telegram?

A. It was to the effect that Mr. Guilbert and Mr. Monnett were absent from the city on their vacation, and would not return until the 22nd of December, and that upon their return he would notify me and would arrange for a meeting of our committee. That was the substance of it.

Q. 54. And when they did return, did he not send you a telegram on December 22nd, saying that the board would hear you?

A. I got a telegram from him on the 28th of December, saying that they would hear us, or that he had arranged for a meeting of our committee *on* 2 o'clock on the 29th.

Q. 55. I will ask you if this is not the fact, that you stated in your examination-in-chief that you had a telegram dated December 22nd, 1897, saying that the board would hear you, and that on December 27th or 28th you went to Columbus to see them. Is that not the fact?

A. The date of the first telegram from the governor—I have the telegram at my home.

Q. 56. If I misunderstood you before, we will have it corrected. You said in that connection something about the committee were not ready to go at that time, and you deferred till later?

A. No, you are mistaken in that, I did not say that because that is not correct. Will you permit me to clear the matter up for you?

Q. 57. Yes, that is what we want.

A. On the 7th of December, 1897, I received a letter from the county auditor stating that the board of equalization had increased the valuation of our bank something over $100,000. The other national banks in the city received similar notices. The result was we had a meeting of the clearance house for conference as to what to do. That meeting, I think, was about the 10th or 12th of December. At that meeting a committee of five was appointed to go to Columbus to confer with the State board of equalization.

372 The committee was composed of Joseph Colwell, F. E. Rittman, E. H. Bourne, M. G. Warner and myself. I was requested to arrange with the governor for the meeting. I wired the governor immediately after the adjournment of our clearing-house meeting, and it was along about the 12th of the month as I have said, asking for an appointment with the State board of equalization. He answered that Mr. Monnett and Mr. Guilbert were absent on their vacation and would not return to the city of Columbus until about the 22nd of December, when he would arrange for a meeting with our committee. On the 28th of December I got a telegram from the governor saying that the gentlemen comprising the board with himself who were absent, had returned, and that they would meet our committee at 2 o'clock on Wednesday, December 29th. We went the next day, wiring the governor beforehand, saying we would be there. This is a copy of my telegram.

Q. 58. What is the date of it?
A. December 28th.

By Judge BOYNTON:

Q. 59. Read it.
A. Witness reads: "Governor Asa S. Bushnell, Columbus, Ohio: Our committee will meet State board of equalization tomorrow, Wednesday, at 2.30 p. m." He said 2 o'clock, but as our train would not reach there until 2.30 I took the liberty to make the date a half hour later.
Q. 60. Is that the extent of the explanation you desire to make?
A. That covers it.
Q. 61. Governor Asa S. Bushnell was the president of the board for the equalization of bank values?
A. Yes, that's why we addressed him.
Q. 62. When you met there at that time did you file any complaint with said board?
A. Any written complaint, do you mean? No.
Q. 63. This was all prior to the time that the bank had paid their tax, was it not, up to December 28th?
A. Yes. We have been permitted to pay our tax a month later. Yes, it was prior to the time of the payment of our tax.
Q. 64. After the members of said board suggested to you that you could have any inequalities corrected—if they so did suggest—before them as a board of revision, did you submit any evidence before them as a board of revision?
A. No, sir.
Q. 65. Was there any evidence submitted at any other time before them, than what you have given?
373 A. Do you mean pertaining to this particular meeting?
Q. 66. Either before or after December 28th.
A. No, not in regard to the tax of 1897.
Q. 67. You had received word from the county auditor of the action of the State board for the equalization of bank values on December 7th, 1897, had you not?
A. That's my recollection.
Q. 68. And that valuation so placed upon the shares of said banks by said board of equalization had not, at the time of the notice to you, been placed upon the duplicate of the county against you, had it?
A. I have no information that would enable me to answer that question definitely.
Q. 69. While you were before said board with the other members of the committee, as a committee representing the various national banks of Cleveland, did you not state to said board that you made a practice of making a horizontal reduction of 5 per cent. for the bad paper held by each of the banks?
A. I didn't make that statement. Some member of the committee might have made that statement. I don't remember whether they did or not, I didn't.
Q. 70. Did you not then say in the presence of said board that for

poor paper, or that what you considered poor paper and real estate they took a certain amount, and that amount in some instances as stated by you was estimated at 5 per cent. of the entire capital stock?

A. Some member of the committee might have made that statement, but I did not. We have no real estate in our bank. Different banks carry different lines of assets.

Q. 71. Did the board not state to you at that time and to your committee that the property on the tax duplicate in Cuyahoga county was placed there at a much less amount than in any other county in the State?

A. I don't remember that statement.

Q. 72. Did they not give that as one of the reasons why they made the raise?

A. I could not say. There was a great deal of informal talk. I could not undertake to repeat all that was said.

Q. 73. You are acquainted with the duties of bank examiners?

A. Somewhat.

Q. —. You have testified to being a bank examiner in the past years?

A. Yes.

374 Q. 75. And you have been asked concerning their practices in some things, have you not?

A. How do you mean?

Q. 76. Concerning their practices or rules in examining resources and liabilities of banks. I mean you have testified here regarding that, have you not?

A. I don't think I understand how you mean the question.

Q. 77. You were interrogated about examiners' records?

A. No, the examiner's report is a different thing from a bank report. I will give any information you want.

Q. 78. I want to ask you what is the practice with bank examiners allowing national banks to carry bad papers on their books?

A. The practice is that bank examiners, when the fact became known to them that a bank has bad assets on its books, they recommend that the bank charge them off.

Q. 79. How long do they let you carry them?

A. That depends wholly upon the nature of the case.

Q. 80. It depends on how bad the paper is, does it not?

A. Yes; for instance if you have a note in suit and there is a probability of winning the suit, though the case is continued for many years, you are permitted to carry that as an asset until the court rules that it is worthless.

Q. 81. So that when a bank examiner passes paper and permits the bank to list that as among the resources of the bank, it is supposed in banking practice to be good paper, is it not?

A. The decision of the bank examiner does not always control. The bank manager is supposed to know more about the assets of his bank than the examiner knows about it. A literal construction of the language of your question would mean that the examiner has to pass upon the paper. That is not true. All the paper is listed be-

fore the examiner comes, and the examiner simply passes upon the assets of the bank as they appear on the books.

Q. 82. You say that in the report made by him upon information received from the association's officers, that he does not report the amount of good paper, and the amount of bad paper of such association?

A. For the benefit of the record I would suggest that you put in there "received information from the officers of the association and the books of the bank." The reading of your question would make it that the examiner simply gets information from the officers. That would be a reflection upon the national banking system.

375 Q. 83. I will repeat my question as modified. You say that in the report made by him upon information received from the association's officers and the books of the bank, that he does not report the amount of good paper and the amount of bad paper of such association?

A. It is his duty to classify the assets of the bank to the best of his knowledge, stating in his report how much of the loans are bad, and how much are overdue or in suspense.

Q. 84. From whom does he receive this information as to whether loans are bad or good, or whether they are held in suspense?

A. From the books of the company and the officers of the bank.

Q. 85. And he is required to examine any of the officers and agents of the banks on these questions?

A. Yes.

Q. 86. Then when he finds out from such sources the amount of bad paper if any which any association holds, what is he required to do with regard to that bad paper?

To which question plaintiff objected on the ground that it is a matter of law.

A. Make the entries on his report to the Comptroller of the Currency in regard to the information which he has obtained.

Q. 87. And what, if anything, does he direct the association to do with regard to that bad paper?

To which question plaintiff objected on the ground that it is irrelevant.

A. He may recommend that it be charged off. His particular duty is to report the findings to the Comptroller of the Currency with such recommendations as may be necessary, and let the Comptroller of the Currency take such action as he may deem proper. The bank examiner is the comptroller's agent.

Q. 88. Now state, Mr. Sullivan, when the Central national bank was examined by the bank examiner last prior to the month of May, 1897?

A. I think January would be the date of the examination preceding May, 1897.

Q. 89. How much, if any, bad paper did the Central national

bank, or you as one of its officers, disclose to the bank examiner as being bad paper, in amount?

To which question plaintiff objected as irrelevant.

A. I don't recollect the amount.

Q. 90. Did you inform him that any portion of the bank's paper was bad paper or uncollectible paper?

376 Same objection by plaintiff.

A. Whatever my opinion of the paper was at the time of the examination, it was my duty to so inform the examiner, and I think I did.

Q. 91. And whatever amount you informed him was bad paper will be disclosed by his report to the Comptroller of the Currency?

A. I suppose so.

Q. 92. Is it his duty to so report?

Same objection by plaintiff.

A. I had no means of knowing that. The examiner never shows his report that he is examining. He retains a copy which is his private matter.

Q. 93. You have stated, have you not, that for the purpose of the return for taxation you deducted 3 per cent. of your capital stock to cover bad paper?

A. No, I did not. You are reasoning from the wrong premises. You use the words "capital stock," and I said 3 per cent. of our notes, bills receivable.

Q. 94. What would 3 per cent. of the bills receivable at the time that that claim was made amount to?

To which question plaintiff objected as irrelevant.

A. Something like $60,000 or $70,000.

Q. 95. Was there any request or direction given to your bank by the Comptroller of the Currency to charge off that amount of paper or any amount of paper as bad paper, during the year 1897?

A. I am not sure whether we received a communication of that kind from the comptroller or not. We did charge off paper, nevertheless.

Q. 91. How much? Can you now state?

A. I could not recollect. No bank man could carry all these figures in his mind. Our books show all these things. It is enough to deal with this business even one day at a time.

Redirect examination of J. J. SULLIVAN.

By Judge BOYNTON:

Q. 97. Did you learn when at Columbus that any complaint had been made to the board of equalization of the valuation fixed on the bank shares of Cleveland by the county auditor? Did any of them state that any complaint was made by anybody? Or did they of their own motion increase the valuation?

A. My recollection is that the statement was made that our county auditor recommended the taxation of bank shares in Cleveland on the figures returned by the respective banks.

377 Q. 98. Was there anything said about any complaints having been made to them by anybody that these figures were not proper and right?

A. Nothing said as to any complaints having been made against the figures that were returned?

Recross-examination of J. J. SULLIVAN.

By Mr. BENNETT:

Q. 99. Didn't you state that you heard right there in Columbus that complaint had been made that Cuyahoga county was one of the lowest counties in the State, and that the banks of Hamilton county had complained against it being so low?

A. I did not state that.

AUGUST 25, 1898—2 p. m.

Parties met pursuant to adjournment and resumed the taking of depositions.

Present: Hon. W. W. Boynton, counsel. Horr & Uhl, by Mr. Horr, for complainants. S. M. Bennett and P. H. Kaiser, for respondent.

W. G. MATHER, a witness produced in behalf of said complainant, being duly sworn, deposes and says as follows:

Direct examination.

By Mr. HORR:

Q. 1. Please state your name, age and place of residence.

A. W. G. Mather; age, 40; 383 Euclid avenue, Cleveland, Ohio.

Q. 2. What, if any, stock did you own in the Mercantile National Bank of Cleveland, Ohio, on the day preceding the second Monday in April, 1897, and on the Wednesday next preceding the second Monday in May, 1897?

A. 70 shares.

Q. 3. What, if any, legal claims and demands, whether for money or other valuable things, or for labor or services due or to become due to you, including deposits in banks or with persons in or out of this State other than such as are money, did you own on that day?

A. Somewhere between $5,000 and $6,000.

Q. 4. What, if any, legal *bona fide* debts did you owe on that day, leaving out of account all obligations to any mutual insur-

378 ance company, all unpaid subscriptions for religious, scientific, literary or charitable purposes, all acknowledgments of indebtedness founded on some consideration not actually received or which you believed at the time of making such acknowledgment to be other than a safe consideration therefor, and all acknowledgments of indebtedness made for the purpose of diminishing the

amount of your credits to be listed for taxation, and to whom did you owe them?

A. $25,000 to the Citizens' Savings and Loan Association of this city.

Q. 5. Did you file or cause to be filed with the auditor of Cuyahoga county, Ohio, this affidavit and demand which has already been offered in evidence as "Plaintiff's Exhibit W. G. Mather" in the Mercantile National Bank case and which purports to be signed by you?

A. Yes.

Cross-examination of W. G. MATHER.

By Mr. BENNETT:

Q. 6. In your affidavit made on the 21st day of May, 1897, you aver that the par value of the Mercantile national bank owned by you is $100 per share. What was the true value in money at that time on that day of that stock?

A. I don't know.

Q. 7. Did you inquire?

A. No, sir.

Q. 8. Was it not on that date in the city of Cleveland worth 135?

A. I cannot tell you, I don't know. I don't remember.

Q. 9. Was there a selling price for it in the city of Cleveland?

A. I presume so.

Q. 10. What was that price?

A. I don't remember.

Q. 11. If you didn't know the selling price, what amount could be obtained therefor per share in money?

A. I don't know.

Q. 12. Do you deny that that stock was worth 135 on that day?

A. Do you mean that it could have been sold at 135?

Q. 13. That it was worth that?

A. Yes, I deny it.

Q. 14. Do you deny that that was at that time its true value in money?

A. I should be very doubtful of that. I should say no.

Q. 15. You are equally certain that it was worth more than par?

379 A. I am not certain of that, no.

Q. 16. As a test you would not have taken par for it on that day, would you?

A. Probably not.

Q. 17. What do your additional credits of $6,000 consist of, in addition to your bank stock?

A. I don't remember them exactly. I had one or two small bills receivable and a small amount of cash in the bank. I feel perfectly safe in saying that they did not aggregate in value over $6,000.

Q. 18. Is this indebtedness to the Citizens' Savings and Loan Association your individual indebtedness, or is some person upon that paper with you?

A. It is my individual indebtedness.

Q. 19. There are no other names upon the note except your own?

A. No.

Q. 20. Was that indebtedness or any portion of it created for the purpose of purchasing bank stock which has been referred to?

A. No.

AUGUST 26TH, 1898—9 a. m.

Parties met pursuant to adjournment and resumed the taking of depositions.

Present: Hon. W. W. Boynton, counsel. Horr & Uhl, by Mr. Horr, for complainant. S. M. Bennett and F. L. Taft, for respondent.

JAMES BARNETT, a witness produced in behalf of said complainant, being duly sworn, deposes and says as follows:

Direct examination.

By Mr. BO-NTON:

Q. 1. Please state your name, age and place of residence.

A. James Barnett; age, 77; residence, Cleveland, 697 Euclid avenue.

Q. 2. General, will you state what stock, what, if any, shares of stock you owned in the Mercantile Bank of Cleveland, Ohio, on the day preceding the second Monday in April, 1897, and on the Wednesday next preceding the second Monday in May, 1897?

A. I owned 400 shares.

Q. 3. What, if any, legal claims and demands, whether for
380 money or other valuable things, or for labor or services due or to become due to you, including deposits in banks or with persons in or out of this State other than such as are money, did you own on that day?

A. There was due me $59,000.

Q. 4. And you may state by whom.

A. The George Worthington Co. owed me about $50,000. These are round sums. I held a note against Thomas H. Willson for $4,000, and I had a note against the George Worthington Co. of $5,000. The $50,000 was an open account.

Q. 5. You may state whether that comprises the debts or obligations due you at that time.

A. That's all, except some small matters.

Q. 6. You may state now what your indebtedness was. What, if any, legal *bona fide* debts did you owe on that day, leaving out of the account all obligations to any mutual insurance company, all unpaid subscriptions for religious, scientific, literary or charitable purposes, all acknowledgments of indebtedness founded on some consideration not actually received or which you believed at the time of making such acknowledgment to be other than a safe consideration therefor, and all acknowledgments of indebtedness made

for the purpose of diminishing the amount of your credits to be listed for taxation, and to whom did you owe them?

A. I owed in the first place a note to the Society for Savings for $32,000. Then I owed jointly with another party, William Bingham, a note about $175,000, which, by agreement, I owe one-third of. Of course, I was liable on the entire note, but the agreement between us is I am to pay one-third and he two-thirds.

Q. 7. To whom did you owe that debt?

A. To the Society for Savings.

Q. 8. You may state whether both of these indebtednesses by you to the Society for Savings were evidenced by promissory notes.

A. Yes, a note signed by Mr. Bingham and myself, and the $32,000 note is signed by me alone.

Q. 9. One-third of the $175,000 is $58,333?

A. Yes.

Q. 10. Add to that the $32,000 makes $90,333.33?

A. Yes.

Q. 11. I put into your hands an affidavit. Did you file or cause to be filed with the auditor of Cuyahoga county, Ohio, this affidavit and demand which has already been offered in evidence as "Plaintiff's Exhibit Barnett" in the case of The Mercantile National Bank of Cleveland, Ohio, *vs.* Hubbard, and which purports to be signed by you?

381 A. Yes.

Q. 12. And did you leave that with the cashier of the bank and authorize him to deliver it to the auditor?

A. Yes.

Q. 13. You seek here to take out the difference between the nominal value of the 400 shares and your indebtedness of $90,000?

A. $90,000 less the $59,000 due me; $31,333 is the indebtedness over the value of my credits.

Cross-examination of JAMES BARNETT.

By Mr. BENNETT:

Q. 14. This affidavit to which Judge Boynton has called your attention is the only affidavit of claim and demand which you have filed?

A. Yes, for that year. I filed one since for last year's amount.

Q. 15. We are only inquiring now for the affidavits of 1897 that were filed for the set-off against your bank stock?

A. Yes, that's right.

Q. 16. You make claim for deduction here of legal *bona fide* debts amounting to $31,333?

A. Yes.

Q. 17. That's all?

A. Yes.

Q. 18. You have made no claim or demand in writing for any additional debts to be set off against your stock, have you?

A. No, sir.

Q. 19. After you made your affidavit on the 20th of May, 1897, state what you did with it.

A. I left it at the bank.

Q. 20. Did you give them any instructions what to do with it?

A. Well, yes. They were to hand it to the attorneys, I think, to Mr. Boynton, to the proper persons that had charge of it.

Q. 21. You introduced no testimony then before the county auditor in regard to your debits and credits, excepting that which is contained in this affidavit?

A. No, sir.

By Judge BOYNTON: We will agree that the only evidence that was presented in any of these cases was the filing of these affidavits by the respective bank cashiers.

Q. 22. You are a holder of national bank stock in the First national bank?

A. Yes, I had at that time, I think, 175 shares.

382 Q. 23. You did not make any claim for deduction on that?

A. No.

Q. 24. Within your affidavit, and for the purposes of the statements therein contained, you placed the valuation of par on this Mercantile National Bank stock, did you not?

A. Yes.

Q. 25. What was the true value in money at the time inquired about on the day preceding the second Monday of April of said stock?

A. The only gauge I'd have about that is, the stock was reduced some time ago and I received 100 shares. It was reduced 40 per cent. and they paid me back $16,000.

Q. 26. I understand by that that the capital stock of the bank was reduced from $1,000,000 to $600,000?

A. Yes, 40 per cent., and they paid back to the stockholders 100 cents on the dollar. I received for that 40 per cent. on those 400 shares $16,000.

Q. 27. But the balance went to increase the value of your remaining shares, did it not—the balance of the new capitalization?

A. I don't understand what you mean.

Q. 28. The value of your remaining shares was enhanced by the reduction of that stock, was it not?

A. That depends altogether. It might and might not.

Q. 29. Did any of the stockholders draw out any portion of the surplus fund or the undivided profits?

A. No, I got a check for the 40 per cent. of the stock, reduction in money, at par.

Q. 30. Do you know what the surplus fund was at that time? To the credit of that stock?

A. I think it was $200,000. The statement will show. I haven't anything before me to show positively. I think it is $200,000.

Q. 31. Do you know what the undivided profits less the expenses and taxes paid were in the month of April, 1897?

A. No, I haven't anything before me to show.

Q. 32. Was it not $89,413?

A. That has been sworn to, and that would be the better evidence. I do not know from personal knowledge. I have no doubt this statement is correct in this Financial Review.

Q. 33. What was the usual selling price of the stock in the month of May, 1897?

To which question plaintiff objected as irrelevant.

A. I could not tell anything about that, for I hadn't any for sale and didn't want to buy any.

383 Q. 34. If it had no usual selling price, what could be obtained therefor in money?

A. Their market reports would show that better than I could tell.

Q. 35. Didn't the quotations of May 3rd, 1897, in the city of Cleveland show that Mercantile National Bank stock was worth 135?

To which question plaintiff objected as irrelevant and on the further ground that the quotations themselves are the best evidence.

A. I would not undertake to say under oath what the value of the stock was at that time or any other time, for I am not a trader in bank stocks particularly, and I do not know its value.

Q. 36. You won't deny but what it was that high at that time?

A. I don't deny and I don't assert that it was. I don't know anything about it.

Q. 37. You have stated your additional credits at that time to have been $59,000. I understood you to say that the George Worthington Co. owed you $50,000, Thos. H. Willson $4,000, and who owes you $5,000?

A. That's George Worthington also. It is another account. That's the reason it is in two separate amounts.

Q. 38. Is the George Worthington Co. account an undivided profit account, or is it money you had advanced to them?

A. It is money due me from the firm on account. It is for various things in the operation of business.

Q. 39. Was the note given by you individually to the Society for Savings for money afterward invested in national bank stock?

A. No, sir, to my great grief it was to pay up losses made in a rolling mill. It went up the chimney and in envelopes to pay the men for their labor. We had about 500 men, and we had to pay those men for 15 days, and it represents that and a good deal of this $175,000. I went into this rolling-mill business, and I don't think I was in any condition to buy bank stock at that time. It all went to pay up these losses, all this $32,000.

Q. 40. State what the indebtedness for $175,000 was given for.

A. Mr. Bingham and I were as much responsible as anybody in this mill. We had to clean up the debts of this mill in the general cleaning up. That's a matter of a good many years ago and we made advancements to this mill in paying up their debts and in the final cleaning up the landed property was turned over to

384 Mr. Bingham and myself in the proportion that we owned there—Mr. Bingham two-thirds and I one-third. So, to settle

up everything, we borrowed money of the Society for Savings—$175,000—and gave them our note and the mortgage on the property down here. We are paying taxes on the property all the time, and interest on this $175,000 every six months.

Q. 41. What deposit in bank did you have on the day preceding the second Monday in April, 1897?

To which question plaintiff objected, and plaintiff's counsel instructed the witness that he need not answer the same unless he so desired.

A. The county returns will show if I had any. It is not very likely I had any. I don't usually expect to have very much.

Q. 42. Where was your bank account kept at that time?

A. At the First national.

Q. 43. You cannot state the amount then of deposit in the bank at that time?

A. No, I haven't any means here of knowing anything about it. Probably I didn't have much money.

401. Mercantile National.

AUGUST 30, 1898—2 p. m.

Parties met pursuant to adjournment and resumed the taking of depositions.

Present: Hon. W. W. Boynton, counsel. Horr & Uhl, by Mr. Horr; Webster & Cook, by Mr. Cook, for complainant. S. M. Bennett and F. L. Taft, for respondent.

W. S. TYLER, a witness produced in behalf of said complainant, being duly sworn, deposes and says as follows:

Direct examination.

By Mr. HORR:

Q. 1. State your name, age and place of residence.

A. W. S. Tyler; age, sixty-three; 399 Euclid avenue, city.

Q. 2. What, if any, stock did you own in the Mercantile National Bank of Cleveland, Ohio, on the day preceding the second
385 Monday in April, 1897, and on the Wednesday next preceding the second Monday in May, 1897?

A. I owned 250 shares.

Q. 3. What, if any, legal claims and demands, whether for money or other valuable things, or for labor or services due or to become due to you, including deposits in banks or with persons in or out of this State other than such as are money, did you own on that day?

A. I do not at the present time recollect any.

Q. 4. What, if any, legal *bona fide* debts did you owe on that day, leaving out of the account all obligations to any mutual insurance company, all unpaid subscriptions for religious, scientific, literary or charitable purposes, all acknowledgments of indebtedness founded on some consideration not actually received, or which you believed at the time of making such acknowledgment to be other than a safe

consideration therefor, and all acknowledgments of indebtedness made for the purpose of diminishing the amount of your credits to be listed for taxation, and to whom did you owe them?

A. I had $15,000 at the Society for Savings, and $10,000 in Adelbert college, and $20,000 at the Mercantile national bank.

Q. 5. Did you file or cause to be filed with the auditor of Cuyahoga county, Ohio, this affidavit and demand which has already been introduced in evidence as "Plaintiff's Exhibit Tyler" in the Mercantile National Bank case, and which purports to be signed by you?

A. Yes.

Cross-examination of Mr. W. S. TYLER.

By Mr. BENNETT:

Q. 6. In this affidavit made on the 26th of May, 1897, Mr. Tyler, you set forth that you were indebted in legal *bona fide* debts at that time in the sum of $25,000, didn't you?

A. I won't trust my memory. I'll take it for granted that whatever is stated there is as I made it. My memory is a little bit treacherous, and some things I might not remember. It is correct as stated in my affidavit.

Q. 7. You filed no other claim or demand, except this one to which your attention has been called by your counsel, have you?

A. No.

Q. 8. And at that time you only sought to have $25,000 of your indebtedness deducted from your 250 shares of bank stock?

A. I supposed that was considered sufficient to cover it.
386 That's the form that is written. The indebtedness I spoke of existed at that time.

Q. 9. What was done with this affidavit? What did you do with it?

A. I simply signed it.

Q. 10. And then what did you do with it?

A. I had Mr. Murphy file it for me. He is connected with the Mercantile national bank.

Q. 11. You do not know as a matter of fact whether he filed it or not?

A. He advised me that he had filed it.

Q. 12. That is simply hearsay. You don't know. You didn't see him file it, did you?

A. I cannot say that I did. I instructed him to file it, and I presume he carried out my instructions. There is a lot of things that I have done that I do not see done but the results show that they have been done.

Q. 13. When you are informed by others that they are done, you are sure they have been done?

A. My company that I am president of——

Q. 14. What company are you president of?

A. The W. S. Tyler Wire Works Company.

Q. 15. How much of an interest did you have on the day preceding the second Monday of April, 1897?

To which question plaintiff objected, and plaintiff's counsel instructed the witness that he need not answer the same.

A. I object to answer.

Q. 16. What was your individual credit in that company set apart to you as your individual credit in April 1897?

A. I could not tell you.

Q. 17. Wasn't there any dividend standing to the credit of your stock and set apart to the credit of your stock at that time?

A. No, sir, there was not.

Q. 18. How do you know?

A. Because I know I rather overdrew. My dividend did not take care of what I was owing to the company. That's why I know, otherwise I probably should not be so clear on the subject.

Q. 19. Did you list any indebtedness here against your company, that you were indebted to your company?

A. I did not think it was necessary.

Q. 20. Take the $15,000 you owed the Society for Savings. Was any part of that $15,000 invested in these 250 shares of Mercantile National Bank stock?

A. No, sir.

387 Q. 21. What collateral have you to secure that?

A. I have the Mercantile Bank stock, 150 shares, to secure that—or, I did have at that time.

Q. 22. What is this amount to Adelbert college represented by?

A. 100 shares of the Mercantile National Bank stock.

Q. 23. Is that a loan?

A. Yes, it is a loan from Adelbert college.

Q. 24. The Mercantile national bank is your creditor to the sum of $20,000?

A. I am indebted to the Mercantile national bank for $20,000.

Q. 25. And were you in April, 1897?

A. Yes.

Q. 26. Does any part of that $20,000 go to apply on either of these other debts of yours?

A. No, sir. This is for money I borrowed to put in my business.

Q. 27. Did the company sign that note, and you borrow it to put into that business?

A. Yes, I am the company. Practically the company signed it, and I endorsed it.

Q. 28. That company you refer to, is what company?

A. The W. S. Tyler Wire Works Company.

Q. 29. That's an Ohio corporation?

A. Yes.

Q. 30. And it had signed this note to the Mercantile national bank, had it not?

A. Yes.

Q. 31. Who had signed it for the corporation?

A. I could not tell you positively. My impression is it was done with a stamp.

Q. 32. By whom?

A. By myself.

Q. 33. As president?

A. Yes.

Q. 34. The W. S. Tyler — Works Company is a solvent corporation, isn't it?

A. I so consider it, yes.

Q. 35. You are merely an accommodation endorser on that paper, are you not?

A. I don't know how you mean that.

Q. 36. You became the endorser on the paper at the time the company negotiated that loan, did you not?

A. Yes.

Q. 37. What did you deposit as collateral, if anything, to secure that loan?

A. I believe—I don't know that it is necessary for me to answer that.

388 Q. 38. Do you want to object to answering that?

A. I don't know whether I do or not. Is it pertinent to the question? You lawyers sometimes ask questions that are not pertinent. If it is necessary, I suppose there is no harm in my answering the question. There was no security put up. My name is considered sufficient for that money.

Q. 39. And the name of the corporation also?

A. Yes.

Q. 40. This wire works company received this money that was thus borrowed from the Mercantile national bank?

A. Yes.

Q. 41. It represents money that that corporation is indebted for?

A. No, it does not represent money that the corporation is indebted for. That note is an individual note of mine and the corporation has nothing to do with it. I took that money, and that can be ascertained at the bank. I took that money and put it into the corporation—into my business.

Q. 42. The corporation is on that note as principal, is it not?

A. No, the corporation is not on the note at all.

Q. 43. Then you wish to have that corrected?

A. If you please, yes.

Q. 44. How is that note signed?

A. W. S. Tyler. It is a personal matter, but I took that money after I got it, and I won't say I put it all in my business, but I put part of it in my business, and I think I put about all of it in.

Q. 45. Then does the corporation—the W. S. Tyler Wire Works Company—owe you that amount of money thus invested in that business?

A. No, they don't. I could not tell you now all the details of the transaction. I know there is no credit or debit passing either way. I was owing the company at the time I got this $20,000, but how much I don't remember. That was paid with part of this $20,000.

It is not a matter of any great moment perhaps, but I have been increasing my business very rapidly at times, and I had been making some investments outside, and part of this money I think went into some purchase of land, but I could not say positively with reference to that.

Q. 46. The investments outside that you speak of, were they real estate?

A. Yes.

Q. 47. Did you not receive a large amount of money from
389 the estate of James F. and Eliza Clarke since 1890, and have that money the second Monday of April, 1897?

To which question plaintiff objected, and plaintiff's counsel instructed the witness that he need not disclose any information as to these things.

Q. 48. In addition to the credits about which you have already testified, did you not have a credit which was due you from the parties above named?

A. No, there was not.

Q. 49. Did you have on hand any credits received from the estates of James F. and Eliza Clarke on the day preceding the second Monday of April, 1897?

A. I didn't know that the Clarke estate would come into this at all. No, I had none.

Q. 50. Do you say that at that time you had received nothing from that estate?

A. No, I didn't say so.

Q. 51. Whatever you received from that estate, had you invested it in any form of securities which you have denominated as credits?

To which question plaintiff objected, and plaintiff's counsel instructed the witness that he need not answer the same.

Q. 52. How much of an individual credit had you on the books of the W. S. Tyler Wire Works Company on the day preceding the second Monday of April, 1897?

A. I had none.

Q. 53. When you speak of investing this $20,000 in that corporation, did you not place that to your credit on the books of the corporation or have it so placed?

A. No.

Q. 54. What had you to evidence your investment of $20,000 in the W. S. Tyler corporation?

A. I could not answer. I told you as definitely as I could. This was borrowed quite a number of years ago, or several years ago. I cannot tell you just how many. I don't know that my books would show how that money was all invested—that $20,000. I did not say that it was invested in the W. S. Tyler corporation.

Q. 55. If it was, what portion was so invested?

A. I could not tell you.

Q. 56. Could you by looking at your books?

A. I don't think so.

Q. 57. Did you just take $20,000 and bodily stick it into that works, without getting credit for it in any way?

A. Hardly.

Q. 58. What evidence of investment if any have you in the W. S. Tyler Wire Works Company?

390 A. I am not sure, I could not tell without looking whether that wasn't put in before it was organized as a corporation. I am not sure about that.

Q. 59. When was it organized as a corporation?

A. It was, I believe, in 1888, but I am not positive as to that.

Q. 60. How long have you owed the Mercantile national bank $20,000?

A. Quite a number of years.

Q. 61. And hasn't that been renewed?

A. It is renewed from year to year.

Q. 62. The last time it was renewed how was the note signed?

A. W. S. Tyler. I told you it was a personal matter, I can only repeat that.

Q. 63. But it went into the W. S. Tyler works?

A. No, I said there might some of it have gone in. I am not sure now that it was a corporate concern at the time I borrowed this money, as I think it over now I am rather inclined to think it was not, so you can see how indefinite my remembrance of it is. I am not here for the purpose of making any point, although I see from your questions that you anticipate that. I can give you the date that the note was made today, and then I can tell you more definitely about it.

Q. 64. What bank did you do your banking with in April 1897?

To which question plaintiff objected as irrelevant cross-examination.

A. (Witness made no audible reply.)

Q. 65. Did you have deposits in bank or with persons in or out of this State, with persons, other than such as are held to be money?

A. No.

Q. 66. Did you have a deposit in the Mercantile national bank in April, 1897?

To which question plaintiff objected as irrelevant cross-examination and as impertinent.

A. I didn't have a personal account in the Mercantile national.

Q. 67. Did you run your personal account in the name of the W. S. Tyler Wire Works corporation?

A. No, sir, I can tell you where I did have it.

Q. 68. Where, if at all, did you keep your account?

A. In the East End savings bank.

Q. 69. Did you have a deposit in the East End savings bank on the day preceding the second Monday in April 1897?

A. If I did, I had so little that it didn't count. I have a deposit there for convenience to check out as I want it.

391 First, Western Res., Mercantile, Commercial, & Nat'l Bank of ——.

ORVILLE L. JONES, a witness produced in behalf of said complainant, being duly sworn, deposes and says as follows:

Direct examination.

By Mr. HORR:

Q. 1. Please state your name, age and place of residence.

A. Orville L. Jones, 49, 16 Cheshire street.

Q. 2. What if any stock did you own in the First national bank, the Western Reserve national bank, the Mercantile national bank, the Commercial national or the National Bank of Commerce, all of Cleveland, Ohio, on the day preceding the second Monday in May, 1897?

A. 31 in the Western Reserve national, 30 in the Mercantile national, 62 in the Commercial national, 26 in the National Bank of Commerce and 75 in the First national.

Q. 3. What if any legal claims and demands whether for money or other valuable things, or for labor or service due or to become due to you including deposits in banks or with persons in or out of this State other than such as are money, did you own on that day?

A. None.

Q. 4. What, if any, legal *bona fide* debts did you owe on that day, leaving out of the account all obligations to any mutual insurance company, all unpaid subscriptions for religious, scientific, literary or charitable purposes, all acknowledgments of indebtedness founded on some consideration not actually received or which you believed at the time of making such acknowledgment to be other than a safe consideration therefor, and all acknowledgments of indebtedness made for the purpose of diminishing the amount of your credits to be listed for taxation, and to whom did you owe them?

A. I owed $13,000 at the Society for Savings, and $15,000 to the National Bank of Commerce.

Q. 5. I show you the affidavits and demands which have already been offered in evidence in each of these respective bank cases as "Plaintiff's Exhibit, O. L. Jones," and ask you to state whether you filed or caused them to be filed with the auditor of Cuyahoga county?

A. Yes.

Cross-examination by Mr. BENNETT:

Q. 6. How much of this indebtedness was created for the
392 purpose of investing in these shares of national bank stock, if any?

A. None.

Q. 7. Your national bank stock was fully paid, independent of the indebtedness which you have created otherwise?

A. Yes.

ORVILLE L. JONES deposes and says further as follows in behalf of the Mercantile National Bank:

Direct examination.

By Mr. HORR:

Q. 1. What official position did you hold during the calendar year of 1897?

A. I was deputy county auditor.

Q. 2. Under Mr. Akins?

A. Yes.

Q. 3. As deputy county auditor what did you have to do at Mr. Akins' request with the returns made by the national banks of Cleveland for that year?

A. I took the returns and tabulated them.

Q. 4. Did you make any computations based on those returns for the purpose of arriving at the valuation to be put upon the stock?

To which question defendant objected unless said computations are before the witness.

A. I tabulated those returns and put the value on about the same as they had been assessed the year before.

Q. 5. Did you preserve the computations which you made, the actual figures which you made in putting these values on?

A. No.

Q. 6. What in fact was the valuation which your computation resulted in, as compared to the face value of the capital stock, surplus and undivided profits, of the respective banks?

To which question defendant objected.

A. Following Mr. Akins' predecessor, he made a regular 60 per cent. basis. But I tabulated it on the same basis and left it for Mr. Akins to change as he saw fit.

Q. 7. You turned the results of your computation over to Mr. Akins?

A. Yes.

Q. 8. And when you turned them over, the valuation which you had expressed was about 60 per cent. of the face value?

393 To which question defendant objected.

A. Yes. Where a bank has real estate, it would be more than where it didn't have real estate.

Q. 9. In making your computations, did you deduct from the sum total of capital stock, surplus and undivided profits the assessed value of the real estate of the banks that had real estate?

A. I deducted the book value.

Q. 10. From the capital stock, surplus and undivided profits?

A. Yes.

Q. 11. You took 60 per cent. of the balance?

A. I said it was about the same basis that they had been assessed the year before.

Q. 12. Do you know whether the results reported by you in that

manner to Mr. Akins were changed by him before he made his valuation of the stock?

To which question defendant objected because it is a matter of record.

A. In some cases he changed them perhaps, after an interview with the cashier. If he wasn't satisfied with the return, and saw a great discrepancy between the return made to the office and that published, he would call them in for an explanation, and he might have raised some.

Q. 13. Do you know as a matter of fact whether there were any changes made?

To which question defendant objected.

A. I cannot be positive now. It seems to me he changed them some.

Cross-examination of ORVILLE L. JONES.

By Mr. BENNETT:

Q. 14. How long did you remain in the county auditor's office? Are you still his deputy?

A. Yes.

Q. 15. You were in April and May, 1897, I believe?

A. Yes.

Q. 16. The computations that you made, you made from the returns as made to the county auditors by the said several banks, did you not?

A. Yes.

Q. 17. You will not now say whether those were true returns or false returns, will you?

A. They made a return there and they swore to it that it was the correct return for taxation.

Q. 18. You made no computations at all from their returns
394 made at the same time to the Comptroller of the Currency, and instituted no comparison between such returns and the returns made for taxation, did you?

A. Yes, that is to say, Mr. Akins did.

Q. 19. Mr. Akins was the auditor at that time?

A. Yes.

Q. 20. Now, didn't Mr. Akins, under the direction given by the State auditor to him, require to be returned as part of the returns of the national banks, a copy of the report made to the Comptroller of the Currency last prior to the date of the return for taxation?

A. We had this book that is published here, the Financial Review. That is what we used. The heading in the bank blank states what is required of them, and among other things is the report you speak of.

Q. 21. That's required by the form prescribed by the State auditor, is it not?

A. Yes.

Q. 22. So in order to supply that, you took the comptroller's return as made for the month of May, 1897, did you not?

A. Yes.

Q. 23. When I say the "comptroller's return" I mean the return to the Comptroller of the Currency. What did you find the fact in percentages between the comptroller's return—I mean the return to the comptroller—and the return for taxation? Which is the greater?

To which question plaintiff objected as irrelevant cross-examination.

A. I do not know. Mr. Akins was making figures on that, I think, when he testified here. I never made any figures on that. I didn't assist him in that part at all.

Q. 24. Did you not know this to be the fact, that the banks in their returns made the deduction of a horizontal per cent. for bad paper, prior to making their return to the auditor for taxation?

A. My recollection is, some of them stated when they were called in in regard to the matter——

By Mr. HORR:

Q. Were you present?

A. I heard some of them. They stated that that was allowed by the auditor of State when they had their session before him some years prior.

Q. 25. On that return so made you say you made the 60 per cent.?

A. I didn't say 60 per cent. I say it was about 60 per cent.

Q. 26. You did not include the value of the real estate, but deducted the book value of the real estate?

395 A. Yes.

Q. 27. That you had always done? Would they always deduct the book value of the real estate?

A. It seems to me that they should be upon the same basis as individual, therefore we used the book value. Another thing would be why we would use the book value, because some would take out before they made the return to the auditor the difference between the tax value and the book value. Some would be paying upon the difference between the book value and the tax value, and others would not.

Q. 28. Was you the party that sent out in Mr. Akins' name the letters to the various national banks in this city, notifying them of the action of the State board for the equalization of bank shares in December, 1897?

A. I don't know whether I mailed them, or whether some of the clerks mailed them.

Q. 29. Did you get up the letter?

A. No, sir.

Q. 30. Do you know that such letters, such notices, were sent to each of the several national banks of the city, notifying them of the action of the State board for the equalization of bank values?

A. Yes.

Q. 31. Did all of said banks or any of them appear before the county auditor after that?

A. I don't know whether they did or not.

Further hearing of depositions adjourned to 9 a. m., August 31, 1898.

AUGUST 31, 1898—1.30 p. m.

Parties met pursuant to adjournment and resumed the taking of depositions.

Present: Horr & Uhl, by Mr. Horr. Webster & Cook, by Mr. Cook, for complainant. S. M. Bennett, for respondent.

A. L. WITHINGTON, a witness produced in behalf of said complainant, being duly sworn, deposes and says as follows:

Direct examination.

By Mr. COOK:

Q. 1. Please state your name, age and place of residence.

396 A. A. L. Withington, 55, 1593 Euclid avenue.

Q. 2. You may state what, if any, stock you owned in the Euclid Avenue national bank, the Mercantile national bank and the Union national bank, all of Cleveland, Ohio, on the day preceding the second Monday in April, 1897, and on the Wednesday next preceding the second Monday in May, 1897?

A. I owned 10 shares in the Euclid Avenue national 30 shares in the Union national, and 30 shares in the Mercantile national.

Q. 3. What, if any, legal claims and demands, whether for money or other valuable things, or for labor or services due or to become due to you, including deposits in banks or with persons in or out of this State other than such as are money, did you own on that day?

A. Outside of an accruing salary I hadn't credits over $400 of any kind.

Q. 4. What, if any, legal, *bona fide* debts did you owe on that day, leaving out of the account all obligations to any mutual insurance company, all unpaid subscriptions for religious, scientific, literary or charitable purposes, all acknowledgments of indebtedness founded on some consideration not actually received or which you believed at the time of making such acknowledgment to be other than a safe consideration therefor, and all acknowlegdment of indebtedness made for the purpose of diminishing the amount of your credits to be listed for taxation, and to whom did you owe them?

A. My *bona fide* debts amounted to something over $18,000; $8,000 to the Peoples' Savings & Loan Association, $2,000 to the Central national bank, $1,900 at the Savings and Trust Company, and then there was between $5,000 and $7,000 that I owed on my house. It is in notes of the regular amounts, something less than $7,000 and more than $5,000, about $6,000—a mortgage.

Q. 5. Did you file or cause to be filed with the auditor of Cuyahoga county, Ohio, this affidavit and demand which has already

been offered in evidence as "Plaintiff's Exhibit Withington," in the Euclid Avenue national bank, and which purports to be signed by you?

A. Yes.

Q. 6. I repeat the same question as to the Mercantile national bank.

A. I did.

Q. 7. And also the same question as to the Union national bank?

A. I did.

397 Cross-examination of A. L. WITHINGTON.

By Mr. BENNETT:

Q. 8. How much of this indebtedness Mr. Withington, was created or incurred in the buying or paying for the national bank stock that you have testified to as being the owner of?

A. None whatever.

Q. 9. Was any portion of this stock pledged as collateral to secure any of this indebtedness on the day preceding the second Monday of April, 1897?

A. Yes.

Q. 10. How much, if any?

A. It was all pledged in the indebtedness for building my house.

Q. 11. Who holds the mortgage indebtedness against the real estate?

A. The man's name is S. M. Neville.

Q. 12. Where does he live?

A. His residence at that time was in New York.

Q. 13. You say you had no additional credits except the bank stock, probably $400?

A. What I said was my salary that was accruing and my credits was less than $400.

Q. 14. Does this represent the true amount of indebtedness on the day preceding the second Monday of April, 1897, that you then owed?

A. Yes.

Q. 15. How much did you claim to deduct from your bank stock in the demands and affidavits which you have testified to having signed?

A. I made out the affidavits to cover the amount of the stock, $33,000 in two cases, and $1,000 in the other, which I supposed was the proper way.

Q. 16. You did not include these $18,000 as your total indebtedness at that time?

A. I didn't suppose it was necessary. I stated enough to cover the credits. I had no motive in the matter whatever.

Q. 17. Your affidavit made on the 17th day of June, 1897, only claims a deduction of $3,000. Is that not true?

A. Over and above all other credits, which I supposed was over this other $3,000, and over the other $1,000.

Q. 18. You filed no other affidavit and made no other proof before the auditor than that contained in that affidavit?
A. No, sir.

398 SEPTEMBER 15TH, 1898—10 a. m.

Parties met pursuant to adjournment and resumed the taking of depositions.

Present: Hon. W. W. Boynton, counsel, Horr & Uhl, by Mr. Horr, Webster & Cook, by Mr. Cook, Hoyt, Dustin & Kelly, by Mr. McKean, for complainant. F. S. Monnett, S. M. Bennett, H. P. Kaiser, and F. L. Taft, for respondent.

WILLIAM BINGHAM, a witness produced in behalf of said complainant, being duly sworn, testified as follows:

Direct examination.

By Judge BOYNTON:

Q. 1. State your name, age and place of residence.
A. William Bingham, age eighty-two, residence Cleveland.
Q. 2. How long have you lived in Cleveland?
A. Sixty odd years.
Q. 3. What, if any, stock did you own in the Mercantile National Bank of Cleveland, Ohio, on the day preceding the second Monday in April, 1897, and on the Wednesday next preceding the second Monday in May, 1897?
A. I owned the 15,000 shares in the Mercantile national bank less their reduction forty per cent. That would be $9,000.
Q. 4. I am speaking of April, 1897. Had they reduced it then?
A. $15,000.
Q. 5. Nominal value $100 a share?
—. ——.
Q. 6. What, if any, legal claims and demands, whether for money or other valuable things, or for labor or services due or to become due to you including deposits in banks or with persons in or out of this State other than such as are money, did you own on that day?
A. Substantially nothing.
Q. 7. What, if any, legal *bona fide* debts did you owe on that day, leaving out of the account all obligations to any mutual insurance company, all unpaid subscriptions for religious, scientific, literary or charitable purposes, all acknowledgments of indebtedness founded on some consideration not actually received or which you believed at the time of making such acknowledgment to be other than
399 a safe consideration therefor, and all acknowledgments of indebtedness made for the purpose of diminishing the amount of your credits to be listed for taxation, and to whom did you owe them?
A. At the old Society for Savings Gen. Barnett and I owe $175,000. I am to pay two-thirds of that by contract.
Q. 8. You were indebted to the Society for Savings on the day

preceding the second Monday of April, 1897, in the sum of two-thirds of $175,000?

A. Yes.

Q. 9. How was that obligation evidenced?

A. By notes and mortgages.

Q. 10. You and Gen. Barnett went into a little foundry enterprise at one time, and took the property, and the property you mortgaged to secure this debt?

A. Yes.

Q. 11. Perhaps you still owe that debt?

A. I do, I am sorry to say.

Q. 12. I put into your hands an affidavit. Did you file or cause to be filed with the auditor of Cuyahoga county, Ohio, this affidavit and demand which has already been offered in evidence as "Plaintiff's Exhibit William Bingham," in the Mercantile National Bank case, and which purports to be signed by you?

A. That's my signature.

Q. 13. You may state whether you caused that affidavit to be filed with the auditor?

A. I did.

Q. 14. Leaving it with the cashier of the bank for that purpose?

A. Yes, with the cashier.

Cross-examination of WILLIAM BINGHAM.

By Mr. MONNETT:

Q. 15. Mr. Bingham, what was the name of the firm of which you say yourself and General Barnett composed?

A. The Cleveland Iron Company.

Q. 16. A corporation?

A. Yes.

Q. 17. Did that corporation borrow that as a corporation, and sign the corporate note?

A. No, sir; it was an individual note of General Barnett and myself.

Q. 18. They were not on the note as a corporation?

A. Not at all.

Q. 19. What collateral security did you deposit with the Society for Savings for that loan?

400 A. A mortgage on the real estate of the corporation.

Q. 20. How much was that mortgage of the corporation to you?

A. About $700,000.

Q. 21. A mortgage for $700,000?

A. The mortgage wasn't for $700,000, but our debt has cost us—I cannot tell you now, it is so many years ago—it is some three or four times what we ever expect to get out of it.

Q. 22. Give us briefly the history of that. How is it that it is your personal debt, and what assets have you to offset that debt or to indemnify you?

A. The concern went up. We were the only solvent stockholders,

and we had a judgment against the concern of $500,000 or $600,000, and we took the property and then mortgaged it to this bank for $175,000, and paid the debts of the corporation.

Q. 23. What became of that mortgage paper which you held as credit that $700,000 mortgage?

A. It was canceled by the judgment.

Q. 24. What became of the property?

A. It came into our hands.

Q. 25. Is there a balance yet left of $175,000 without any collateral?

A. No collateral except the mortgage.

Q. 26. The mortgage is still alive then?

A. Yes, the mortgage to the bank is alive.

Q. 27. That mortgage is from you, or from the corporation?

A. From us.

Q. 28. Then you do have a credit; isn't that mortgage made to you?

A. No, it is made to the bank by us.

Q. 29. How long did you carry the debt of $175,000 at the bank as your debt on collateral security, and what was that security?

A. They never had any security, than this mortgage, that I know of.

Q. 30. Does the real estate stand in your individual names?

A. I don't remember. I don't think—I know the real estate now stands in the name of Bingham and Goodwillie.

Q. 31. Where is that real estate?

A. Down on the flats here in the city; General Barnett and myself are getting to be pretty old men.

401 Redirect examination of WILLIAM BINGHAM.

By Judge BOYNTON:

Q. 32. You and General Barnett were the two solvent stockholders in that corporation?

A. Yes.

Q. 33. And the property was deeded to you by the corporation?

A. No, by the court.

Q. 34. In some proceeding, the title came to you?

A. Yes.

Q. 35. And you borrowed on the strength of that title $175,000 to pay the indebtedness of the corporation?

A. Yes.

Q. 36. Instead of paying it out of your own books as individual liable stockholders?

A. Yes.

Q. 37. And the Society for Savings still holds that debt against you, secured by that mortgage?

—. ——.

Q. 38. Have you any valid claims of the company to you, to balance that $175,000?

A. Not a cent.

Recross-examination of WILLIAM BINGHAM.

By Mr. MONNETT:

Q. 39. When did this property come into your name or your name and that of your son-in-law? Is it not in General Barnett's name?

A. After this transaction some years ago, the General and I are getting to be pretty old men, we concluded to deed that property to my son and his son-in-law, so the title would be perfect in somebody who might sell it when we were dead.

Q. 40. Subject to this mortgage that is on it?

A. Yes, of course.

Q. 41. Have you no other credits than this $15,000?

A. Not a dollar left. That's the only thing I have got. Everything has gone in to pay the debt of this corporation.

OCTOBER 13TH, 1898—9 a. m.

Parties met pursuant to adjournment and resumed the taking of depositions.

Present: Hon. W. W. Boynton, counsel, Webster & Cook, by Mr. Cook, Horr & Uhl, by Mr. Horr, for complainant. M. G. Norton and P. H. Kaiser, for defendant.

402 JOSEPH COLWELL, a witness called on behalf of the Mercantile national bank, being first duly sworn, testified as follows:

Direct examination.

By Judge BOYNTON:

Q. 1. What is your name, age and place of residence?

A. Joseph Colwell, 54 years of age, Cleveland, Ohio.

Q. 2. You are vice-president of the Commercial national bank?

A. Yes.

Q. 3. You may state what notice the Commercial national bank or any of its officers had that the State board of equalization for bank shares at Columbus was about to or was taking any action relating to the increase of the valuation of the shares of the Commercial national bank as fixed by the county auditor in the month of November or December, 1897? I mean to say, what information you had as to any action they were taking in either of those months, of November or December, 1897?

A. The only notice I am aware of was through the county auditor here, who informed me of the increased valuation placed upon the shares.

Q. 4. Before that information given you by the auditor, had you any information of any of the board's meetings at Columbus?

To which question defendant objected.

A. I had none whatever.

Q. 5. You may state whether or not the State board of equaliza-

tion for banks in the year 1897 gave to any of the banks, to your knowledge, any notice of their meetings held to hear complaints and equalize the valuation of national bank shares for 1897.

To which question defendant objected.

A. No, none to my knowledge.

Q. 6. Were you a member of a committee that visited the State board of equalization for banks at Columbus during the month of December, 1897?

A. I was.

Q. 7. You may state if anything was said in your interview with the members of the board about the banks here not having notice of their meetings, and if so, what was it?

To which question defendant objected.

A. The committee were there, but I can't say which member of the committee called the attention of the board to their mission
403 to notify us of any meeting or hearing, and their reply was that the State statute was sufficient notice to us.

Q. 8. You may state whether they claimed to have given any other notice.

To which question defendant objected.

A. They did not.

Q. 9. What did they say about hearing you then at that time?

To which question defendant objected.

A. They said that the State board had adjourned *sine die*, and couldn't be brought together again for any hearing of our committee.

Q. 10. You may state about what time in the year it was that you had this meeting with them.

To which question defendant objected.

A. Very late in the year, I think in December.

Q. 11. And when the attention of the members was called to the fact, the officers of the bank here had no notice of their meetings or contemplated action, their reply, as I understand you, was that the statute notified you when they would be called together, or substantially that?

To which question defendant objected and moved the court to strike out all of this line of inquiry and all that has been said on this subject about conversations at Columbus.

A. Yes, sir.

Cross-examination of Mr. COLWELL.

By Mr. TAFT:

Q. 12. In the certificate you stated you filed claiming an offset on account of the indebtedness, what amount did you claim in that certificate?

A. $22,000. I claim an offset of all the tax on shares.

Q. 13. On the debt you owed to the Society for Savings, what security, if any, have you given for that?

A. The stock of the Commercial national bank.

Q. 14. How many shares?

A. 154, I think.

Q. 15. And when was that indebtedness created?

A. I can't recollect.

Q. 16. And is that all the security that is deposited?

A. Yes, sir.

Q. 17. And about when was that indebtedness created?

A. I can't recollect; it has run several years—quite a number of years.

404 Q. 18. And was any part of that indebtedness created for the purpose of purchasing stock in the Commercial national bank?

A. Not that I recollect.

Q. 19. When did you acquire that?

A. I am unable to say without looking at books, but it is several years ago.

Q. 20. But has this indebtedness been standing at the Society for Savings as long as you have owned the stock?

A. No, I think not.

Q. 21. And what was the money that you secured from the Society for Savings used for?

A. In business transactions; I couldn't recollect for just what without looking up books. It stood quite a number of years.

Q. 22. Was the entire amount secured at one time?

A. Yes, sir.

Q. 23. What purpose was it secured for then, if you secured that much at one time?

A. What was it used for I can't say now.

Q. 24. But you wouldn't be securing $15,000 at one time from the Society for Savings without knowing what it was for, would you?

A. At the time, certainly not.

Q. 25. Can you not now recollect?

A. I can't.

Q. 26. Could you find out?

A. I presume I could after looking at my books.

Q. 27. Will you?

A. I will if you so desire.

Q. 28. And on the indebtedness of $7,000 to Mr. Otis, what security, if any, have you given him for that indebtedness?

A. I gave him 50 shares of the Commercial National Bank stock.

Q. 29. Is that all the security he has got?

A. That is all, yes, sir.

Q. 30. He is president of your bank, is he?

A. He is now, yes, sir.

Q. 31. In this affidavit, you claim an offset of legal *bona fide* debts

in the sum of $22,000. That is the only affidavit that you filed claiming an offset in the year 1897?

A. Yes, sir.

Q. 32. What was the value of stock in the Commercial national bank on the day preceding the second Monday in April, 1897, the true value in money?

A. That is a hard thing to answer. It is largely a matter of opinion. I don't know of any sales at that time that would make a price for it, a true value in money.

405 Q. 33. If you don't know what the true value of it in money was, what was the usual selling price at that time?

A. I can only guess at it.

By Judge BOYNTON: I object to the witness guessing at it.

Q. 34. Well, now, if there was not a usual selling price known to you, then what price did you believe could have been obtained therefor in money at that time?

A. I should say somewhere from 120 to 130 shares.

Q. 35. What were the market quotations about that time?

A. I don't know.

Q. 36. Do you think as much as $130 could have been obtained for the stock?

A. I put that as an outside figure; I don't know that they could have been obtained for that.

Q. 37. Isn't it a fact that it was quoted at more at that time?

A. My impression is it was not.

Q. 38. How long has the loan to Charles A. Otis been standing?

A. I am unable to say; several years.

Q. 39. Was any part of that money used in the purchase of shares of stock in the Commercial national bank?

A. No, I think not.

Q. 40. What was it used for?

A. For other transactions; I can't recollect what now.

Endorsements on part third.

Part third. Mercantile National Bank *et al.*, *vs.* R. S. Hubbard, treasurer. Filed Feb. 15, 1899. Irvin Belford, clerk, U. S. circuit court, N. D. O.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF Cleveland, Ohio,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio.
} No. 5714. Chancery.

NORTHERN DISTRICT OF OHIO, *ss:*

I, Irvin Belford, clerk of the circuit court of the United
406 States, for said district, do hereby certify that the annexed and foregoing pages embraced in volume 2 contain a full and true copy of the depositions of Theodore M. Bates, Albert E. Akins, John Van Nostran, James Molyneaux, Norton T. Horr, Edwin R. Perkins, Samuel E. Williamson, Thomas H. Wilson, J. J. Sullivan, W. G. Mather, James Barnett, W. S. Tyler, Orville L. Jones, A. L. Withington, William Bingham, and Joseph Colwell, together with stipulations and exhibits filed on behalf of complainant as therein noted, the originals of all which are on file in my office and in my custody as clerk of said court.

In testimony whereof, I have hereunto signed my name and affixed the seal of said court, at Cleveland, in said district, on this 31st day of January, A. D. 1900, and of the 124th year of the Independence of the United States of America.

[SEAL.] IRVIN BELFORD, *Clerk*,
By JNO. VAN NOSTRAN, *Deputy*.

PART FOURTH.

*Defense.*

OCTOBER 13, 1898—9 a. m.

Parties met pursuant to adjournment and resumed the taking of depositions.

Present: Hon. W. W. Boynton, counsel; Webster & Cook, by Mr. Cook; Horr & Uhl, by Mr. Horr, for complainant. M. G. Norton and P. H. Kaiser, for defendant.

PETER R. FAHEY, a witness produced in behalf of said defendant, being duly sworn, deposes and says as follows:

Direct examination.

By Mr. MONNETT:

Q. 1. Please state your name, age and place of residence.

A. Peter R. Fahey; age, 32; 82 Ingleside avenue.

Q. 2. What has been for the last few years your general business?

A. Broker business generally, buying and selling stocks, bonds and investments and securities.

Q. 3. In the county of Cuyahoga?

A. Yes.

407 Q. 4. You may state whether during the year 1897, especially in May, by reason of your business investments and selling and disposing of stocks and bonds, you had occasion to investigate and determine the market value or the real or true value of the Mercantile National Bank stock, and if you can refresh your memory from any memoranda you have, you may give that.

To which question plaintiff objected because of its indefiniteness in relation to the particular value that counsel are inquiring about, as to be incapable of an answer. Also on the ground that the memorandum referred to speaks for itself, if the witness has such a memorandum.

A. I will answer that question in the negative, no. I would like to say that this particular department of our business is under another man of our firm, who would be better able to answer questions along these lines.

Q. 5. Who is that man?

A. Mr. Calvert has particular charge of this local department of our business.

Q. 6. From the knowledge you have, what was Mercantile National Bank stock worth on or about May 20, 1897?

To which question plaintiff objected on the ground that it appears from the statement of the witness that he has not sufficient knowledge to enable him to form an opinion.

A. About 130 a share. (Witness uses the file of the Cleveland Leader as a memorandum.)

Q. 7. So that its market price in the market, to the best of your information and belief, was about 130 a share?

To which question plaintiff objected as leading.

A. I would say that while that was the nominal market value, it would not necessarily follow that you could sell every share of the bank at that price. If you were to go in the market to sell 10 or 100, you might obtain that price. But if you were going to offer half of the capital stock, it is not very probable; it would naturally have a tendency to depress the market.

Q. 8. In other words, if they would dump a large lot of bank stock, that would be indicative of some wrong?

A. Yes, and I would say further that because of their not having an exchange here, or any authoritative source of quotations, these prices are more susceptible to orders than they would be if they were going through the clearing-house. If a man goes to sell 100 shares of stock, the conclusion is that there must be something. And if a man wants to buy, a man jumps to the conclusion that he wants it real bad.

408 Q. 9. 130 was about the average market value?

A. Yes.

Q. 10. It might have been some higher and some lower?

To which question plaintiff objected as leading.

A. Yes, you might have to pay 135. If you wanted 3 or 6 or 10 shares it would be sold at about 130.

Q. 11. Is May 15th the nearest you can come to it?

A. That's the only one I saw in there.

Q. 12. What was the value of said stock about May 23, 1897?

Objected to on the ground that witness refers to a newspaper for his information and his guide, not giving his opinion.

A. I would say about the same—130 to 135.

Q. 13. I will call you- attention to the stock of the National Bank of Commerce for the same days. Give about what the market value of the bank shares of the National Bank of Commerce was at those periods.

Same objection upon the same ground.

A. About the same.

Q. 14. How much?

A. 130.

Q. 15. Give the same dates, and the value of the stock of the Commercial national bank.

Same objection on the same grounds.

A. I don't find it recorded here. About 125.

Q. 16. What would you say to the best of your knowledge and belief as to the value of the Central National Bank stock on those dates?

Same objection upon the same grounds.

A. 130.

Q. 17. What would you say to the best of your information and belief as to what the value of the National City bank was on those dates?

Same objection upon the same grounds.

A. The National City Bank stock is worth 180 or more.

Q. 18. What would you say, to the best of your knowledge and belief, as to the value of the Western Reserve Bank stock on those dates?

Same objection upon the same grounds.

A. I would say from 125 to 135.

Q. 19. What would you say, to the best of your information and belief, as to the value of the First National Bank stock *was* on those dates?

Same objection upon the same grounds.

A. I haven't any recollection of the value of that stock.

409 Q. 20. What would you say, to the best of your knowledge and belief, as to the value of the Cleveland National Bank stock on those dates?

Objected to upon the same grounds.

A. Nor that either.

Q. 21. What would you say, to the best of your knowledge and belief, as to the value of the State National Bank stock on those dates?

Objected to upon the same grounds.

A. 120 to 130.

Q. 22. What would you say, to the best of your knowledge and belief, as to the value of Union National Bank stock on those dates?

Objected to upon the same grounds.

A. I could not say as to that either.

Q. 23. What would you say, to the best of your knowledge and belief, as to the value of Park National Bank stock on those dates?

Objected to upon the same grounds.

A. About 120.

Q. 24. What would you say, to the best of your knowledge and belief, as to the value of Euclid Avenue National Bank stock on those dates?

Objected to upon the same grounds.

A. It was worth probably 140 to 145.

Q. 25. Can you tell anything from these official reports?

A. No, sir, the market value is not given there.

Q. 26. You are in the business, and were at the time you refer to in a general way?

A. Yes, in a general way.

Q. 27. By refreshing your memory and looking at these dates you say that is substantially the market price on those dates?

Same objection upon the same grounds.

A. Yes.

Q. 28. You remember that independent of this record?

Objected to.

A. Yes.

Q. 29. Was there much variation from the prices given here on those dates?

A. Very slight.

Q. 30. Would it exceed 5 per cent.?

A. About 5 per cent., it might vary that much.

Cross-examination of PETER FAHEY.

By Judge BOYNTON:

Q. 31. You have been refreshing your memory from a
410 newspaper before you in giving your testimony-in-chief. Will you kindly give the name of that newspaper?

A. The Cleveland Leader.

Q. 32. And in drawing your data you may state whether you relied upon the statements made in the Leader as to the valuations fixed by you upon the shares?

A. Slightly so.

Q. 33. What member of your firm is it that is more particularly informed on the market value of shares of national banks of the city than yourself?

A. No member of the firm, but an employé.

Q. 34. What is his name?

A. G. M. Calvert.

Q. 35. I understood you to say that this department of the business was lodged with this young man?

A. Principally so, yes.

Q. 36. And the business transacted by you in your work relates to other matters?

A. Yes.

Q. 37. Do you know the value of the resources over the liabilities of any bank of whose stock you have spoken?

A. No, sir.

Q. 38. Did you know anything about the character of their resources in the year or spring of 1897?

A. No, sir.

Q. 39. Did you know how much bad or uncollectible paper any of the banks the value of whose shares you have undertaken to state—the market value of whose shares you have stated—had in April or May, 1897?

A. No, sir.

Q. 40. Had you any personal knowledge of the intrinsic value of the shares of any of these banks?

A. No, sir.

Q. 41. Your judgment has been formed entirely or partly from what has been reported in the newspapers respecting the market value of the shares?

To which question defendant objected.

A. Only partly.

Q. 42. Did you purchase any shares of any one of these banks in the month of April or May, 1897?

A. No, sir.

Q. 43. Did you sell any shares of any of the banks in either of those months?

A. No, sir.

Q. 44. Did your firm buy or sell in April or May, 1897?

A. I could not say positively, I rather think not.

Q. 45. Whatever information you have on the subject of
411 the market value of shares is not derived from any actual purchase or sale made by yourself or your firm?

A. No, sir.

Q. 46. Is it not true Mr. Fahey, that the reported market value of shares of bank stock in the newspapers stands on the same figure

often for a long time, because of the fact that there are no transfers during that period of time?

A. Yes.

Q. 47. And is it not true that the market value would stand at that figure, although the intrinsic value of the shares may have increased or decreased during that time?

Objected to.

A. It is possible.

Q. 48. For instance if the shares of stock of the Mercantile national bank are quoted on a given day by the newspapers at 130 a share, it would remain at that figure as stated in the newspapers till the proprietors of the paper had some information from additional sales that the price had gone up or down?

To which question defendant objected.

A. As I understand, the newspapers have an arrangement by which they get a revised list probably once a week, and they publish it just about that often. Any change between that time would hardly be noticed.

Q. 49. I understand your newspaper reports are made up from information given by street brokers to newspaper men?

A. Yes; entirely by street brokers.

Q. 50. And written into the newspapers?

A. Yes.

Q. 51. And until such broker advises the paper of a change as to the market value of certain shares, they remain in the paper at that figure although the bank in the meantime may have sustained enormous losses, making its stock intrinsically worth much less?

To which question defendant objected.

A. The papers only publish this list one day and it is dropped out then. There is no quotation at all till the new list comes out. Each paper has its own different arrangement as to that.

Q. 52. And until such broker advises the paper of a change as to the market value of certain shares, they remain in the paper at that figure although the bank in the meantime may have sustained enormous losses, making its stock intrinsically worth much less?

To which question defendant objected because it is a calamity that never happened to any bank here in Cleveland.

412 Q. 53. (cont.) I will ask you whether it don't stand at the figure named until there has been some change in the value, although the bank may have sustained some loss in the meantime?

A. Yes; the list remains as published in the meantime.

Q. 54. You have already stated that you have no knowledge personally of the value of the resources of any of the banks, compared with its liability?

A. No, sir, I have not.

Redirect examination of PETER FAHEY.

By Mr. MONNETT:

Q. 55. I will ask you whether you are familiar with the official report made by the bank to the Comptroller of the Currency that they publish annually in the Leader and other papers in the city of Cleveland, which are filed with the auditor officially, showing the resources, liabilities and surplus and undivided profits?

To which question plaintiff objected because it is immaterial whether he has such knowledge or not.

A. I may have read the reports, but never made any note of them or kept any record of them.

Q. 56. You were asked on cross-examination who made up these reports. I believe you said substantially the brokers dealing in the stock. How do they come to make up this value?

A. By visiting around the various prospective purchasers.

Q. 57. You have been asked if you had any information from the newspapers. I will call your attention to the official publication of defendant bank under date of May 21, 1897, and ask you if that furnished any information to the public, and if so what it was, giving the amount advertised as capital stock, surplus fund and undivided profits and the date of the paper.

To which question plaintiff objected on the ground that the question calls upon the witness to read a statement from a newspaper that he has before him, called the Cleveland Leader.

A. I find published in the Cleveland Leader May 21, 1897, a statement purporting to be sworn to by Charles L. Murfey, cashier of the Mercantile national bank giving the capital stock paid in $1,000,000, surplus fund $200,000, undivided profits less expenses and taxes paid $89,413.87.

Q. 58. Now as a broker you were asked what means or information you had to determine what the intrinsic value of the stock
413 was. If that published affidavit which you have just read be true, would you say that a million dollars' worth of stock having that amount of surplus and undivided profits was worth at that time in the market below or above par?

To which question plaintiff objected on the ground that it asks for an opinion from the witness without his having shown any qualification to answer.

A. About par.

Q. 59. Assuming that the bank paid the taxes, what would that stock be worth on the market, it being already deducted out of that surplus and undivided profits?

To which question plaintiff objected on the ground that the bank never paid the tax except as the agent of respective shares.

A. Between 128 and 129.

Q. 60. How do you fix that value to that sworn statement?

A. From the accumulated surplus and undivided profits added to the capital stock.

Q. 61. Do you know a publication named the "Financial Review" published in this city?

A. Yes.

Q. 62. How is that published? How are the affidavits and reports of banks in there, obtained, if you know?

To which question plaintiff objected on the ground that it must be hearsay.

A. I don't know how they are obtained.

Q. 63. Are they in general circulation in Cuyahoga county?

A. Yes.

Q. 64. Were they at that time?

A. Yes.

Q. 65. I will call your attention to a report of the Mercantile national bank May 20, 1897, on page 12, sworn to by C. L. Murfey, being the same publication that has been heretofore offered in evidence, and state what the stock, surplus and undivided profits were reported at that time and in that publication.

To which question plaintiff objected on the ground that the publication itself is the best evidence.

A. I find published in the Financial Review of June, 1897, an affidavit purporting to be sworn to by C. L. Murfey, cashier on May 20, 1897, giving the capital stock paid in as $1,000,000, surplus fund $200,000, undivided profits less expenses and taxes paid $89,413.87.

Q. 66. That's the same as the one you have just given, and the same date?

414 A. Yes.

Plaintiff moves to strike out the answer on the ground that it was the mere reading of what on a former occasion had been read from the same pamphlet by other witnesses upon cross-examination by the attorney general of the State.

Q. 67. What would be the value of a share of stock under the date you have just given from the Financial Review report?

To which question plaintiff objected because the witness shows incompetency to answer.

A. 128 to 129.

Q. 68. I will call your attention to the National Bank of Commerce and ask you if you had published reports to go by to determine its value, purporting to be signed by the members or officers of the bank, and if so state what—similar to the publication you have just given in the above bank.

To which question plaintiff objected on the ground that the papers before the witness do not purport to have been signed by the cashier of the bank, but they are merely printed copies of another document which is not laid before the witness to enable him to de-

termine whether the signature to the document was the signature of the cashier.

A. I find a similar report on the National Bank of Commerce published in the Cleveland Leader May 21, 1897, purporting to be sworn to by F. E. Rittman, cashier, giving the capital stock paid in as $1,500,000, surplus fund $300,000 and undivided profits less expenses and taxes paid $71,837.17.

Q. 69. Was there a similar publication in the Financial Review?

Same objection by plaintiff.

A. I find a similar publication in the Financial Review, sworn to under date of May 20, 1897.

Q. 70. Basing your judgment as a broker upon the data there published if that be true, what was the market value of that stock on that date from that data?

To which question plaintiff objected.

A. I would say between 135 and 140.

Q. 71. You may explain how you determine that that would be the value of the stock. What is the method of computation?

A. Their surplus fund and undivided profits amounted to about 40 per cent over and above their capital. I made a mistake in calculating that. I would like to correct my former answer to
415 read 124 to 130 instead of what I have said. It was 24 to 30 per cent. above the surplus and undivided profits.

Q. 72. I call your attention to the Commercial national bank. Have you a similar report?

A. The Cleveland Leader May 21, 1897, has a report purporting to be sworn to by William P. Johnson, cashier, under date of May 20, 1897, giving the capital stock paid in $1,500,000, surplus fund $500,000, undivided profits less expenses and taxes paid $6,702.07. The same publication appears in the Financial Review of June under the date of May 20.

Plaintiff objected to witness' statement of contents of papers and magazines.

Q. 73. What would be the value of the stock of that bank in Cuyahoga county on those dates with that data?

Same objection.

A. 130 to 135.

Q. 74. Can you give similar data of the Central national bank? If so, give the same.

To which question plaintiff objected on the ground that witness is reading from a newspaper which the master is supposed to be able to read himself.

A. I find published in the Cleveland Leader of May 2, 1897, the statement of the Central national bank purporting to be sworn to by J. J. Sullivan, cashier, under date of May 20, 1897, giving the capital

stock paid in as $800,000, surplus fund $135,000, undivided profits less expenses and taxes paid $42,594.33.

To which answer plaintiff objected on the ground that he is reading from a copy of the Cleveland Leader.

A. (cont.) I find similar data in the Financial Review purporting to be sworn to by J. J. Sullivan, cashier, May 20, 1897.

Same objection as to the Financial Review.

Q. 75. What, from the data that was furnished by the published publication, was the value of the stock?

A. A little over 120 per share.

Q. 76. Have you similar data as to the National City bank? If so, you may give the same.

To which plaintiff objected on the grounds previously stated.

A. I find published in the Financial Review of June, 1897, a statement purporting to be sworn to by E. R. Date, cashier, of the National City bank, giving the capital stock paid in $250,000, surplus fund $150,000, undivided profits less expenses and taxes paid $146,483.45. I do not find that in the Leader. I would say it was worth about 178 to 179.

416 Q. 77. Have you similar data as to the Western Reserve national bank? If so, you may give us that.

Same objection as previously stated.

A. I find in the Cleveland Leader under date of May 20, 1897, this report of the condition of the Western Reserve national bank, purporting to be signed by G. S. Russell, cashier, and dated May 20, 1897, giving the capital stock paid in as $1,000,000, surplus fund $125,000, undivided profits less expenses and taxes paid $17,176.91. I find a similar report published in the Financial Review of June, 1897, also purporting to be sworn to by G. S. Russell, cashier, under date of May 20, 1897.

Q. 78. Now give the information what would the stock be worth in the market on that date?

Objected to.

A. 125 to 130.

Q. 79. Have you a similar publication as to the First national bank? If so, give it?

To which question plaintiff objected on the ground that witness still reads from a newspaper and from the Financial Review, which the master is supposed to be able to read himself.

A. I find published in the Cleveland Leader, May 21, 1897, a report of the condition of the First national bank purporting to be sworn to by Thomas H. Wilson, cashier, May 20, 1897, giving the capital stock paid in as $500,000, surplus fund $100,000, undivided profits less expenses and taxes paid $8,412.77, and I find a similar report published in the Financial Review of June, 1897.

Q. 80. With that data furnished by the banks in their publication,

what would you say the market value of a share of stock would be on or about May 20, 1897?

Same objection.

A. 121 to 122.

Q. 81. Have you similar data as to the Cleveland national bank? If so, give it.

To which question plaintiff objected on the grounds previously stated.

A. I find published in the Financial Review of June, 1897, a report of the condition of the Cleveland national bank, purporting to be sworn to by T. W. Hill, cashier, under date of May 20, 1897, giving the capital stock paid in as $500,000, surplus fund $100,000, undivided profits less expenses and taxes paid $13,341.78. I do not find any publication in the Leader of that.

Q. 82. On that data furnished by the banks under oath to the public, what would the value in the public market be of that stock at that time?

417 A. A little over 122.

Q. 83. I will ask you now was that its market value at that time?

A. Its condition would justify that value.

Q. 84. If that is true that they have sworn to, that would be its market value—if that data that they have sworn to is true, that would be its market value by your standard in the city as brokers?

A. Yes.

Q. 85. Have you similar data as to the State national bank? If so, you may give it.

To which question plaintiff objected on the grounds previously stated.

A. I find published in the Cleveland Leader May 21, 1897, a report of the condition of the State national bank purporting to be sworn to by Horace R. Sanborn, cashier, May 20, 1897, giving the capital stock paid in as $500,000, surplus fund $100,000, undivided profits less expenses and taxes paid $19,462.69, and I find a similar report published in the Financial Review of June 1897, and sworn to May 20, 1897, by Horace R. Sanborn, cashier.

Q. 86. With the data there furnished, assuming that to be true, what would the market value of the stock be worth on that day in Cuyahoga county? Would be the market value of it?

To which question plaintiff objected on the grounds previously stated.

A. About 120.

Q. 87. Have you similar data as to the Union national bank? If so, you may give it.

A. I find published in the Cleveland Leader, May 21, 1897, the report of the condition of the Union national bank purporting to be sworn to by E. H. Bourne, cashier, under date of May 20, 1897,

giving the capital stock paid in as $1,000,000, surplus fund $200,000, undivided profits less expenses and taxes paid $46,982.95, and I find a similar report in the Financial Review purporting to be sworn to by E. H. Bourne, cashier, under date of May 20, 1897.

Q. 88. From that data what was the stock worth on the market in Cuyahoga county at that time?

To which question plaintiff objected on the grounds previously stated.

A. 124 to 125.

Q. 89. Have you similar data as to the Park national bank? If so, you may give it.

To which question plaintiff objected on the grounds previously stated.

418 A. I find published in the Financial Review of June 1897, a report of the condition of the Park national bank of Cleveland, purporting to be sworn to by John Sherwin, cashier, under date of May 21, 1897, giving the capital stock paid in as $500,000 surplus fund $25,000, undivided profits less expenses and taxes paid $17,081.39.

Q. 90. On the data there furnished and held out by said bank under its oath or the oath of its officers, what would be the value in the market of that stock?

Same objection.

A. Between 108 and 110.

Q. 91. Have you similar data as to the Euclid Avenue national bank? If so, you may give it.

Same objection as previously stated.

A. I find published in the Cleveland Leader May 21, 1897, a report of the condition of the Euclid Avenue national bank purporting to be sworn to by C. E. Farnsworth, cashier, under date of May 19, 1897, giving the capital stock paid in as $500,000 surplus fund $150,000, undivided profits less expenses and taxes paid $65,221.46. I find a similar report in the Financial Review also purporting to be sworn to by C. E. Farnsworth, cashier.

Q. 92. What is the market value?

A. 141.

It is agreed that the Leader just read from is of the official files of the auditor of Cuyahoga county as required by section 895 of the Revised Statutes of Ohio.

Whereupon the further hearing of these depositions was adjourned until November 10, 1898, at 9 o'clock a. m.

*Defense.*

NOVEMBER 10, 1898—9 a. m.

Parties met pursuant to adjournment and resumed the taking of depositions.

Present: Hon. W. W. Boynton, counsel for complainant. F. S. Monnett, Smith W. Bennett and P. H. Kaiser, for defendant.

The examination of PETER FAHEY resumed.

Recross-examination of PETER FAHEY.

By Judge BOYNTON:

Q. 92. In giving the foregoing values in your redirect ex-
419 amination of shares of the respective banks, I notice that you add the capital, surplus and undivided profits together, and divided the same by the capital of the bank. Is that true?

To which question defendant objected on the ground that witness has given values of the stocks from two hypotheses, the latter on re-examination was in answer to cross-examination as to whether he had any means of ascertaining the values other than rumor, and the question is ambiguous so that it cannot be answered.

A. As I understand it I only added the surplus and undivided profits, and divided it by the capital.

Q. 93. You divided the surplus and undivided profits by the capital of the bank?

A. Yes.

Q. 94. And from that you deducted the value of the shares as given by you?

A. In that way I deducted the premium of the shares over par, which I added to the par value to make the actual value, as I understood it.

Q. 95. Suppose the capital of the bank had been impaired by bad investments, or that the surplus and undivided profits had been largely diminished from what they were stated to be by bad investments, would you then say that the value fixed by you to the shares would be correspondingly diminished?

To which question defendant objected.

A. Yes.

Q. 96. I think you stated in your examination that you had no knowledge of the actual condition of the finances of any of the banks?

A. I have none, no, sir; except what I read in the public papers.

Q. 97. You have no personal knowledge?

A. No personal knowledge, no, sir.

Redirect examination of PETER FAHEY.

By Mr. MONNETT:

Q. 97. Your attention has been called to the matter of losses of the plaintiff banks in your recross-examination. I ask you now whether as such a dealer in bank stocks or as a broker you have any means of taking that into consideration in determining what was testified to yesterday. If so what have you?

To which question plaintiff objected.

A. I have nothing except that I was under the impression that all banks charged off such losses about once a year or some
420 stated time, and I presume that in the report read yesterday such losses had been accounted for. But I have no positive knowledge of it.

Q. 98. If the reports sworn to that you examined yesterday on the dates therein referred to by the cashiers of the banks were true, that helped to determine the market value or the real value so far as the public was concerned, upon which you based your testimony?

A. Yes.

Q. 99. If they were false, there might be a higher or a lower value on those stocks?

A. Decidedly so.

G. N. CALVERT, a witness produced in behalf of said defendant, being duly sworn, deposes and says as follows:

Direct examination of G. N. CALVERT.

By Mr. MONNETT:

Q. 1. Please state your name and place of residence.

A. Gerald North Calvert. I reside in Cleveland.

Q. 2. How long have you resided here?

A. 3 years.

Q. 3. What was your business in the last ten years?

A. That of accounts, chiefly as an accountant.

Q. 4. What training had you in the way of an accountant?

A. Five years articleship to a firm of chartered accountants in London, whose business is the investigation of the accounts of corporations, banks and railroads, to determine the value of their stock and also to testify to the correctness of their accounts.

Q. 5. When did you come to this country? How long have you been here?

A. Six years.

Q. 6. Have you had any business in your line as you have stated as an accountant in stocks and bonds in the city of Cleveland? Have you had occasion to report on the stock values of the banks of the city of Cleveland?

A. Nothing beyond my position as a broker.

Q. 7. How long have you been a broker in this city?

A. About fifteen months—that is known as a broker in this city.

Q. 8. Prior to that time did you have any information as a broker outside of being connected with the present firm?

A. Yes, connected financially.

Q. 9. Have you had experience as a broker?

421 A. Yes, on certain occasions.

Q. 10. Can you tell me as such broker how you would determine the actual value or market value of the defendant bank's shares of stock? Give all the data you would use from their official statements or from their books or from the buying and selling on exchange, or what data you would take into consideration, giving it as fully as you can determine the true value in money of such stocks?

To which question plaintiff objected as being so much involved that it is difficult to understand it.

A. In determining the value, the market value or the actual value, I would take the surplus fund and the undivided profits, less all expenses and I would total it, and the percentage of that above the capital stock I would add to the par value of the stock.

Q. 11. Do you use any other data than this published report to determine the actual value of stocks on the market?

To which question plaintiff objected.

A. Yes, as the value of the market price of stock is reflected a great deal by the demand of the stock and the principal people who are interested in the stocks who might take the stock actually. At the same time there is sympathy attached to the market, and the demand for a stock will raise its price. Where a stock lies quiet, it will depreciate, but never except in a very few instances below the price that is determined by official records.

Q. 12. And that is based upon the surplus and profit to determine how much above par the respective banks are?

A. An evil report will depreciate stock.

Q. 13. Assuming that there is no evil report, and taking the officially published reports before you as true, under the date of May 21, 1897, being a part of the conceded official files of the county auditor, what would you say the value of the shares of stock of the plaintiff, The Mercantile National Bank was on or about that date?

To which question plaintiff objected because it is not a question for an expert.

A. I find on May 21, 1897, Mercantile National Bank report, purporting to be sworn to by Mr. Murfey, capital stock paid in one million dollars, surplus fund $200,000, and undivided profits less expenses and taxes paid $89,413.87.

Q. 14. You said there was an actual value and a market value, give the actual value and the probable market value.

422 A. The actual value determined from that statement would be between 128 and 129.

Q. 15. Can there be a higher or lower market value than that? And if so, what would enter into the market value?

A. Certainly. The market value might be reflected upon partly by the good will of the bank, or to a large extent by that, and might still be higher than that actually determined by the books.

Q. 16. Take up the National Bank of Commerce and state whether you have similar data as to that.

To which question — objected because it is not a question for an expert.

A. May 21, 1897, I find capital stock paid in $1,500,000, surplus fund $300,000, undivided profits less expenses and taxes paid $71,837.17. These are purported to be sworn to by F. E. Rittman, cashier. The value of the stock as shown by these figures would be about 137 to 138.

Q. 17. Can there be a speculative market value higher than that?

To which question plaintiff objected on the ground previously stated.

A. Yes, depending very largely on the good will of the bank and reflecting on the securities and other things reported to be held by them.

Q. 18. In assuming that value to be true, and there being no financial rumors against the bank, what would you say the actual value was of these shares at that time?

A. As I have given it.

Q. 19. Now, take up the Commercial national bank in the same manner and state whether you have similar data as to it?

To which question plaintiff objected on the ground previously stated.

A. May 21, 1897, I find the capital stock paid in $1,500,000, surplus fund $500,000, undivided profits less expenses and taxes paid $6,702.07, purporting to be sworn to by W. P. Johnson, cashier. The value would be about 133 to 134.

Q. 20. Adopting that method of making your calculations, please make a schedule of what would be the market values of all the 12 banks involved in this litigation?

A. I will do so.

Said schedule furnished by the witness is as follows, to wit:

| | | |
|---|---|---|
| | Mercantile national | 128-9 |
| | National Bank of Commerce | 125 |
| 423 | Commercial national | 133-4 |
| | Central national | 122-3 |
| | National City | 216-0 |
| | Western Reserve | 114-5 |
| | First national | 121-2 |
| | Cleveland national | 122-3 |
| | State national | 123-4 |
| | Union national | 124-5 |
| | Park national | 108-50 |
| | Euclid national | 143-4 |

Cross-examination of G. N. CALVERT.

By Judge BOYNTON:

Q. 21. You have no personal knowledge of the character of the paper that either of these banks held in the months of April or May, 1897?

To which question defendant objected.

A. No.

Q. 22. Is the actual value of shares of stock in a bank affected by the character of its paper? That is, if a portion of its paper is worthless, uncollectible, would that diminish the value of the shares from what it would be if that paper was all good and collectible?

Objected to.

A. Yes.

Q. 23. Do you know whether or not the report made by either banks to which your attention has been called, to the Comptroller of the Currency, excluded therefrom any bad or uncollectible paper which the bank at that time owned?

Same objection.

A. I don't know.

Q. 24. Do you know whether or not the report made to the Comptroller of the Currency of the resources of the bank included all that appeared to be resources upon their books, without regard to whether more or less of them were uncollectible?

Same objection.

A. I don't know.

Q. 25. In making the estimate you have made of the actual value of the shares of stock of the respective banks, were you, or were you not guided wholly by the report, by what appears to have been a report of the banks to the Comptroller of the Currency laid before you in the form of newspaper publications?

Same objection.

A. My figures were gathered from the reports before me now, the actual reports.

424 Q. 26. And from that report and those figures you made the judgment you gave as to the value of the shares?

Same objection.

A. Yes.

Q. 27. What do you mean by the expression "actual reports" in your former answer?

Same objection.

A. I mean the reports placed before me and reported as official reports as published in the newspapers.

Q. 28. Do you not know the difference, being an expert, between the actual report made to the Comptroller of the Currency and filed

in Washington, and the publication of that report in the newspapers of this city?

To which question defendant objected as impertinent.

A. If there is a difference, I have to answer that somewhat ambiguously—if I answer and say I believe this report to be true because it is published as such I would expect the Washington report to be the same. On the other hand it is to the advantage of the banks, their local business, to publish a report here which in substance may be perfectly true and yet may not tally with that at Washington, what you might call "Chinese copy." These things I am not aware of inasmuch as I don't do my business in Washington.

Q. 29. You don't seem to catch the point of my question. In the former answer you made, you spoke of an "actual report" made by the banks to the Comptroller of the Currency, as if you had that actual report before you. I now ask you again if you do not know the difference between the actual report signed by the officers of the bank and filed with the Comptroller of the Currency and publication of that report in a newspaper or in a financial magazine. The question is whether you know the difference, or whether you regard the two as the same.

To which question defendant objected.

A. No, I don't regard the two as the same.

Q. 30. What did you mean in your former answer by referring to the "actual report" made to the Comptroller of the Currency by the bank?

Same objection.

A. In my former answer I stated my figures from the report placed before me.

Q. 31. And that is a newspaper report?

Same objection.

A. Yes.

Q. 32. And that is the report you wish to be understood as referring to when you said "actual report"?

425 Same objection.

A. Certainly.

Redirect examination of G. N. CALVERT.

By Mr. MONNETT:

Q. 33. Your attention has been called as to the mode of bookkeeping as reported in the official reports under May 21, 1897, questioning your use of the terms "resources," "surplus fund" and "undivided profits." What do these terms mean as used in bookkeeping? Does that mean that surplus includes worthless paper and bad debts, or actual valuable assets?

A. It should not. Surplus should include unquestionable assets.

Q. 34. How about undivided profits?

A. Undivided profits are an actual asset.

Q. 35. So that this imaginary bad paper, if the terms are used accurately as book-keepers should use them, should be actual assets without any worthless accounts?

A. It should be written off.

Q. 36. Assuming that each of such reports exhibited in detail and under appropriate heads the resources and liabilities of these banks at the close of business on the day which it is specified, what would you say as to your answer heretofore being correct or not on the actual value of such stocks?

A. Do I understand you to mean in looking at the statement made would I still adhere to my former statement and the price determined?

Q. 37. Yes, assuming that they were used in the sense in which ordinary book-keepers use them?

A. Yes, I should still determine them in the same way.

Q. 38. And that is true of each of the banks you have just testified to?

A. Yes.

Recross-examination of G. N. CALVERT.

By Judge BOYNTON:

Q. 39. Have you ever been in a bank in any official capacity—cashier, teller, book-keeper or otherwise?

A. No, sir.

Q. 40. Do you know from personal knowledge whether banks carry along from month to month and sometimes more than a year, paper on their books represented in their resources—doubtful in character—before the same is charged off?

A. Yes.

Q. 41. That's done frequently, is it not?

426 A. Yes, that's done. That's why I was anxious to spread out—not being asked to determine the value of these things and doing this from the standpoint of an accountant. In doing these things there is to be taken into consideration to a large extent the stocks and securities and the banking-house furniture and fixtures and real estate and mortgages owned. These things are apt to fluctuate immensely, and in answer to my last question it is a well-known fact that banks carry paper from time to time, probably they may take a certain percentage off of its value, but they will carry it before they will strike it off as a bad debt?

Redirect examination of G. N. CALVERT.

By Mr. MONNETT:

Q. 42. If they earned 10 per cent. in six months and they had bad paper, they would only declare a dividend of 6 per cent. for that paper and use the other?

A. By rights they should keep a profit and loss fund, what in manufacturing terms is called a depreciation account.

Q. 43. So that the surplus is not an accumulation of any bad debt, but as it appears in the profit and loss account.

A. I should read surplus as being the surplus of the bank at that time unquestionably. You see there is no other account, there is no contingent account. I think they put their contingent account into their surplus again and call it surplus.

Q. 44. If they paid year in and year out 6 per cent. dividend, or 3 per cent. semi-annually, then out of what fund would they likely be charging off their bad debts?

A. Out of probably the surplus of their former profits. The bank may this year make 10 per cent., it may only declare it has charged off 4 per cent. to meet contingencies.

Q. 45. So there would be 6 per cent. taken out of the surplus, and 4 per cent. taken out of the surplus for dividends, and leave the actual surplus?

A. Yes.

Q. 46. That surplus should show what is left after they paid the dividends and paid out any contingencies, should it not?

A. If they actually paid them out it would not appear in the surplus. They might still hold paper in the surplus which in the next year would be worth nothing.

Q. 47. And they might have some which would be worth more than par?

427 A. Yes, but if it was paper upon which they had loaned money, and they held it above par, that would be a question of speculation of the bank and not a question of actual value.

S. C. HALE, a witness produced in behalf of said defendant, being duly sworn, deposes and says as follows:

Direct examination.

By Mr. MONNETT:

Q. 1. Please state your name and business.

A. S. C. Hale; I am a reporter on the Leader for the most part.

Q. 2. As a reporter what is your special department?

A. Commerce and finance.

Q. 3. As commercial and financial reporter did you have anything to do with gathering the official Federal reports of the national banks, or the statements of the national banks of Cuyahoga county, or of Cleveland on or about May 21, 1897?

A. I had nothing to do with that part. That was furnished by the banks themselves.

Q. 4. I will call your attention to that part of the financial publications of May 21, 1897, headed "National bank statement," and ask you as a reporter of the Leader who furnished this to the Leader?

A. They were furnished by the banks themselves.

Q. 5. These are the same reports that have just been used by the witnesses preceding you on the stand, Calvert and Fahey?

To which question plaintiff objected on the ground that counsel is instructing the witness what to say.

A. Yes.

Q. 6. Is this the official files of the Leader as left with the county commissioner and left with the county auditor of Cuyahoga county?

A. Yes, to the best of my knowledge.

Q. 7. I exhibit to you a publication known as the Financial Review, or the official returns of all banks of the city of Cleveland, purporting to be a publication of these same reports of the condition of the plaintiff banks on the same date. Do you know anything about this publication?

A. No, sir, I don't. Not definitely. I understand they are taken from the reports we have in the paper.

By Judge BOYNTON: I move the court to strike the answer out after the words "I understand."

428 Q. 8. There are in the same edition made before and after the official publications you have just testified to, columns of reports of the financial standings of the banks, and stock values of the shares of said banks. Have you anything to do with gathering that information, and if so, what?

A. Yes.

Q. 9. How do you ascertain these values as appear published on May 15th and 16th just preceding this report, and on the Saturday immediately following this said report?

A. We furnish these as the best information we can get in regard to the value of the stock in the market.

Q. 10. On May 16, 1897, there is on page 27 of that edition of the Leader a publication of the plaintiff banks' stock shares. Did you have anything to do with gathering that?

A. Yes.

Q. 11. I will call your attention to the first one, the Central national bank, marked "par 100, last dividend 3 per cent., bid 130, asked 131." You may state whether that represents the market value on that date.

To which plaintiff objected on the ground of want of knowledge of the witness as to the market value of stock on those days.

A. Yes, to the best of my knowledge it does.

Q. 12. I notice a similar report of The Cleveland National Bank, a plaintiff bank, "par value 100, last dividend 3 per cent., bid 118, asked 120." Does that represent the market value of that date?

To which question plaintiff objected on the grounds previously stated.

A. Yes.

Q. 13. I notice a similar report prepared by you for The Commercial National Bank, one of the plaintiff banks. "Par 100, last dividend 3 per cent., amount bid 123, asked 125." I ask you if that is the market value of that date for that bank stock?

To which question plaintiff objected on the grounds previously stated.

A. Yes.

Q. 14. I call your attention to a similar report of The Euclid Avenue National Bank, one of the plaintiff banks. "Par 100, last dividend 3½ per cent., bid 145, asked 147." I ask you if that is substantially the market — of that plaintiff bank on that date?

To which question plaintiff objected on the ground previously stated.

429 A. Yes, to the best of my knowledge.

Q. 15. I notice a similar report prepared by you for The First National Bank, one of the plaintiff banks. "Par 100, last dividend 3 per cent. dividend, bid 123, asked 125." I ask you if that is the market value of that date for that bank stock?

To which question plaintiff objected on the ground previously stated.

A. Yes, to the best of my knowledge.

Q. 16. I notice a similar report prepared by you for The Mercantile National Bank, one of the plaintiff banks. "Par value 100, last dividend 3 per cent., amount bid 132, asked 135." I ask you if that is the market value of that date for that bank stock?

To which question plaintiff objected on the ground previously stated.

A. Yes, to the best of my knowledge.

Q. 17. I notice a similar report prepared by you for The National Bank of Commerce, one of the plaintiff banks. "Par 100, last dividend 3 per cent., amount bid 132, asked 135." I ask you if that is the market value of that date for that bank stock?

To which question plaintiff objected on the ground previously stated.

A. Yes.

Q. 18. I notice a similar report prepared by you for The National City Bank, one of the plaintiff banks. "Par value 100, last dividend 2 per cent., amount bid 190, asked 205," with a star marked "quarterly dividend." I ask you if that is the market value of that date for that bank stock?

To which question plaintiff objected on the ground previously stated.

A. Yes, they pay quarterly dividends and the others semi-annually.

Q. 19. I ask you if that is the true market value on that date of that stock?

A. Yes.

Q. 20. I notice a similar report prepared by you for The Park National Bank, one of the plaintiff banks. "Par value 100, last divi-

dend 3 per cent., bid 124, asked 125." I ask you if that is the market value of that date for that bank stock?

To which question plaintiff objected on the ground previously stated.

A. Yes, to the best of my knowledge.

Q. 21. I notice a similar report prepared by you for The
430 State National Bank, one of the plaintiff banks. "Par 100, last dividend 3 per cent., bid 120, asked 121." I ask you if that is the market value of that date for that bank stock?

To which question plaintiff objected on the ground previously stated.

A. Yes.

Q. 22. I notice a similar report prepared by you for The Cleveland National Bank, one of the plaintiff banks. "Par 100, last dividend 3 per cent., amount bid 126, asked 128." I ask you if that is the market value of that date for that bank stock?

To which question plaintiff objected on the ground previously stated.

A. Yes.

Q. 23. I notice a similar report prepared by you for The Western Reserve National Bank, one of the plaintiff banks. "Par 100, last dividend 3 per cent., amount bid 128, asked 129." I ask you if that is the market value of that date for that bank stock?

To which question plaintiff objected on the ground previously stated.

A. Yes.

Q. 24. I call your attention to the report under date of May 22nd, 1897, in which you have prepared, under the head of local stocks and bonds, the following quotations for the same as near as can be ascertained by a careful canvas- of the market. Did you prepare that list?

A. Yes.

Q. 25. The list reads as follows: "National banks: Central 100 par, last dividend 3 per cent., bid 130, asked 131." Was that the actual value of the stocks on that date?

To which question plaintiff objected on the ground previously stated.

A. Yes, to the best of my knowledge.

Q. 26. The Cleveland national bank, under date of May 22nd, 1897. "Par value 100, last dividend 3 per cent., bid 118, asked 120." I ask you if that was the market value of that stock on that date?

To which question plaintiff objected on the ground previously stated.

Q. 27. The Commercial national bank. "100 par, 3 per cent.

interest, bid 124, asked 126." I ask you if that was the market value of that stock on that date?

To which question plaintiff objected on the ground above stated.

A. Yes.

431 Q. 28. The Euclid Avenue national bank. "Par 100, dividend 3½, bid 146, asked 148." I ask you if that was the market value of that stock on that date?

To which question plaintiff objected on the ground previously stated.

A. Yes.

Q. 29. The First national bank. "100 par, 3 per cent. dividend, 123 bid, 125 asked." I ask you if that was the market value of that stock on that date?

To which question plaintiff objected on the ground previously stated.

A. Yes.

Q. 30. The Mercantile national bank. "100 par, 3 per cent. dividend, 133 bid, 135 asked." I ask you if that was the market value of that stock on that date?

To which question plaintiff objected on the ground previously stated.

A. Yes.

Q. 31. The National Bank of Commerce, "100 cents par, 3 per cent. dividend, bid 132, asked 135." I ask you if that was the market value of that stock on that date?

To which question plaintiff objected on the ground previously stated.

A. Yes.

Q. 32. The National City bank, "100 par, 2 per cent. quarterly dividend, 190 bid, 205 asked." I ask you if that was that market value of that stock on that date?

To which question plaintiff objected on the ground previously stated.

A. Yes.

Q. 33. The Park national bank, "100 par, 3 per cent. last dividend, 122.50 bid, asked 123.50." I ask you if that was the market value of that stock on that date?

To which question plaintiff objected on the ground previously stated.

A. Yes.

Q. 34. The State national bank, "100 par, last dividend 3 per cent., bid 120, asked 121." I ask you if that was the market value of that stock on that date?

To which question plaintiff objected on the ground previously stated.

A. Yes.

Q. 35. The Union national bank, "100 par, last dividend 3 per cent., bid 126, asked 126." I ask you if that was the market value of that stock on that date?

To which question plaintiff objected on the ground previously stated.

A. Yes.

432 Q. 36. Western Reserve national bank. "100 cents par, 3 per cent. dividend, bid 128, asked 129." I ask you if that was the market value of that stock on that date?

To which question plaintiff objected on the ground previously stated.

A. Yes, that's the market price.

Q. 37. Now turn to reports six months later. I notice there was prepared on September 19th, six months after this date, quotations for local stocks in the city of Cleveland under said date of the same plaintiff banks. Did you familiarize yourself with the files at that time, and are these true?

A. Yes, to the best of my knowledge.

Q. 38. The plaintiff banks, according to that report, paid the same dividend in the next six months, and the stock values are substantially the same as you have just testified?

To which question plaintiff objected on the ground previously stated.

A. Yes.

Q. 39. Was that true?

To which question plaintiff objected on the ground previously stated.

A. That report is true in regard to the values as I have stated.

Q. 40. You may state to the court what data, including your conversations with any officers of the banks or from their published reports that you used, in making these reports.

To which question plaintiff objected until notified who these officers were and what banks they represented.

A. I had no conversations with any officers of the banks. My information came largely from stock brokers who handled these stocks, as to the prices they are offered and sold at. I get the market value from what parties bid and what is asked. The asked price is generally the one which the holder of the stock asks, and the bid price is what is offered by some party who wishes to buy.

Q. 41. What is the actual value of stock where it pays a uniform dividend of three per cent. semi-annually in the market?

To which question plaintiff objected on the ground that witness has not shown himself competent to answer the question.

A. I could not say as to that.

Q. 42. Does the value of plaintiff's bank stock depend upon the regularity of dividends, or upon the surplus and undivided profits?

A. Yes, very materially.

433 Q. 43. As to any of these said stocks of plaintiff's banks, have you as a reporter been notified that they are too high by the banks, and that is not their actual value?

A. No, sir.

Q. 44. Have you been told by the plaintiff banks or their officers that their official published reports are untrue?

A. No, sir.

Q. 45. Did they ever complain about these published quotations to you in any way?

A. Now and then there has been criticism.

Q. 46. Too high or too low?

A. Sometimes too high and sometimes too low.

Q. 47. Can you give any instances of that of any particular bank?

To which question plaintiff objected.

A. I think the Cleveland national criticised me once in regard to their quotation being too low.

Q. 48. When? During the year 1897?

A. Yes, I think it was.

Q. 49. Who did that?

A. The cashier, Mr. T. W. Hill.

Q. 50. He claimed that your quotations were too low?

A. Yes.

Q. 51. What was that conversation, if you can give it?

To which question plaintiff objected.

A. I don't recollect. He claimed it was too low as compared with other bank stock. I asserted my belief that we were putting it about right; that that was the price that was bid; that that's all it was bringing in the market.

Q. 52. Were there any other banks being reported by you complaining of being quoted too low?

A. None that I recollect.

Q. 53. None complained about being too low?

A. No, sir.

Q. 64. Can you tell as such reporter of bank stocks whether there is any element of value placed upon their official reports as to surplus and undivided profits?

A. It is very largely placed upon the official reports as to value of surplus and undivided profits.

Q. 55. They have always been held out by the banks as the actual condition of their banks?

A. Yes, they are reliable.

Q. 56. And the dividends have corresponded with that report for the last five years?

A. Yes, to my knowledge.

Q. 57. And are still corresponding?

434 A. Yes, the same dividends.

Q. 58. Is there a difference between the market value and the actual value, and if so, what makes it?

To which question plaintiff objected.

A. The difference between that depends on whether the buyers want that particular stock and are willing to bid what they consider the actual value.

Q. 59. But market value is substantially what it is considered from one day to the other?

Objected to.

A. Yes.

Cross-examination of S. C. HALE.

By Judge BOYNTON:

Q. 60. If I understood you correctly, you obtained your information of the values of the shares of stock of the respective banks from the inquiries made of brokers?

A. Yes.

Q. 61. And if a particular individual is willing to pay $25 premium for a share of stock, and a broker so advised you and he does not obtain the stock, you put in your papers that bids for the stock of that bank are 125?

A. Yes.

Q. 62. And if the owner of 100 shares of stock should offer it in the market at 125 and should not be able to obtain it, you would put it down "asked 125"?

A. We generally put it down as bid and asked. The bid price is what some buyer offers to pay for certain bank stocks.

Q. 63. Some particular buyer?

A. Any buyer.

Q. 64. Suppose, Mr. Hale, that half of the stock of the Mercantile national bank should be thrown into the market tomorrow, how would that affect its market value?

A. It would decrease its value.

Q. 65. If all of the shares of the stock should be offered for sale in the market, how would that affect its value?

To which question defendant objected.

A. It would decrease its value. There would be a lack of confidence as to what the stock is worth and buyers would not be as willing to purchase as if there was not that much offered.

Q. 66. Isn't it a fact that there are persons who have money who wish to make of it a permanent investment, that are willing to pay more than the real value of stock in order to obtain that investment?

435 A. Yes, sometimes.

Q. 67. Isn't it true that because of the permanent character of bank stocks that they command sometimes in the market more

than their actual value, judging from the dividend-paying capacity of the bank?

A. Yes.

Q. 68. You said—if I took you down correctly—that the reports of the value of the shares of the stock of the various banks published in your paper were made from the reports of the banks to the Comptroller of the Currency?

A. Yes.

Q. 69. Assuming that the reports of the resources and liabilities of the bank to the Comptroller of the Currency represent in all cases the actual valuable assets?

A. Yes.

Q. 70. So that if a bank returns its capital at a million dollars, and its resources at $1,300,000 and makes no deduction from its resources of any bad debts, the apparent value of the assets determines very largely the value of the shares of stock?

To which question defendant objected.

A. Yes.

Q. 71. You have no knowledge I suppose, Mr. Hale, upon the point of the banks' return to the Comptroller of the Currency in fact representing what appears on their books to be assets?

A. No, sir, I am not a bank examiner. I don't know in regard to the value of any investments it may have of other funds.

Q. 72. If it was known by the purchasers of stock of bank shares that the bank whose capitalization and surplus were published at $1,300,000 was in fact worth only one million, how would that affect the market value of the shares?

A. It would increase it.

Q. 73. Correspondingly to the amount of bad debts?

A. Yes, to the amount of bad debts.

Redirect examination of S. C. HALE.

By Mr. MONNETT:

Q. 74. That is, if an admission is made that they were holding out a false statement to the public of $300,000, in that particular bank, you mean to say that the stockholders and managers of that bank would, notwithstanding they knew that—would it induce them to sell much quicker?

436 A. If it was generally known that they were holding assets of that kind, a buyer would not be willing to buy.

Q. 75. But the seller would be willing to sell rapidly?

A. Yes.

Q. 76. That's the reason you say that the market value and the actual value are substantially the same under ordinary circumstances? If a loss had occurred, a stockholder owning stock in such bank, would, of course, sell more rapidly than if the loss had not occurred?

A. Yes.

Q. 77. And in order to sell he would have to reduce the price?

A. Yes, offer a better inducement.

Q. 78. And none of these things occurred to affect the value of these plaintiff banks during 1897?

A. Nothing discreditable to the banks.

Q. 79. During that whole year that is now closed and gone nothing of that kind happened and they paid their dividends regularly?

A. Yes.

Q. 80. And were protected by the officers of the State and county and city and police power under that valuation?

To which question plaintiff objected as ridiculous and nonsensical.

A. Yes.

Recross-examination of S. C. HALE.

By Judge BOYNTON:

Q. 81. You don't mean to say that the banks of the city or some banks of the city in 1897 were not overtaken with a lot of bad paper?

A. No, sir, I don't undertake to say that.

Q. 82. Or that paper suddenly turned out to be bad?

To which question defendant objected because no bank is specified.

A. No, sir.

Q. 83. But certain banks of the city might have had very much poor paper without your knowledge?

A. Yes.

Q. 84. You weren't in the habit of going to the banks to ascertain how much good or bad paper they had?

A. No. It is none of my business. I am not a bank examiner.

Q. 85. Whether or not the column in the report to the Comptroller of the Currency representing resources, represented the actual value, you don't know?

A. No, sir.

437 Redirect examination of S. C. HALE.

By Mr. MONNETT:

Q. 86. None of these imaginary banks with that imaginary bad paper rushed into the market to dispose of it on that theory?

A. No, sir.

Q. 87. Nor did the stockholders of such banks?

A. No, sir, not that I know of.

Q. 88. Did the directors or officers of such banks dispose of their stock at a greatly reduced price?

A. No, sir, very little stock of national banks was in the market in 1897?

Q. 89. It was held just as firm as ever?

A. Yes.

FRANK J. SMITH, a witness produced in behalf of said defendant, being duly sworn, deposes and says as follows:

Direct examination.

By Mr. MONNETT:

Q. 1. You may state your name, residence and business.

A. F. J. Smith. I am with Lamprecht Bros., in the capacity of a broker.

Q. 2. What are the duties of a broker in the city of Cleveland and what have they been for the last three years?

A. To sell stock.

Q. 3. How long have you been such broker?

A. About five years.

Q. 4. As such broker give generally what you are required to do to ascertain the value of stock, and what you have to do with bank stock?

To which question plaintiff objected.

A. If a man has any bank stock, he notifies me that he has so many shares, and I go and see if I can sell it.

Q. 5. Do you make any investigation, use any data in selling or buying stock?

A. If a man has any to sell, I ask what he is going to sell for.

Q. 6. Do you go to the banks for any information?

A. No, sir.

Q. 7. Do you ever refer to the national bank statements?

A. Very seldom.

Q. 8. Did you ever examine the reports of the banks in
438 this city, or any of them, either in the Financial Review or in the Leader?

A. Yes, I look at them and see how they stand.

Q. 9. Will you state from the Mercantile national bank's report under May 21, 1897, what data you would use there as a broker to ascertain the value of that stock, either as a salesman or a purchaser?

To which question plaintiff objected because the witness has stated that when he goes out to sell stock he offers for it what the seller is willing to sell at, and that when he goes to buy he pays what the buyer is willing to pay for it.

A. I would not use it as a value. I am not the one that determines the value. The buyer is the one that determines the value of it.

Q. 10. You go purely upon what the stockholders and officers of the bank will take for their stock, and what the man that wants to buy wants to buy it for?

A. The man who had the stock to sell or the stockholder, he is the only man I have any dealings with. The officers would not affect me at all. I would not ask them any questions. They would not be apt to tell me if I did.

Q. 11. Didn't they complain that you put the stock in too low or too high?

A. I could not state positively of any bank that did.

Q. 12. Didn't you say that you have had complaints because you quoted their stock too low during 1897?

A. I would not say positively, I might have had such a thing occur. I don't remember. I could not state any particular bank. I have heard of complaints, but none direct to me.

Q. 13. Are these reports that are published of that date the market value of the stocks that you have there in the Leader of that date that was testified to by the preceding witness?

A. I say the market value is the value a man will pay.

Q. 14. Did you have any of these stocks to sell or buy?

A. Yes, I think so.

Q. 15. Did they vary from that price, and if so, how much and what banks?

A. Do you mean some particular bank?

Q. 16. Can you give us your sales and amounts for May, 1897?

A. No, sir, not unless I was forced to do it. It wouldn't be just to the buyer or seller. It is private information.

Q. 17. I don't care for any other feature of your business except the plaintiff's bank stocks?

439 A. I will repeat my former answer.

Q. 18. Are you an officer of the bank?

A. No, sir, I am a director, that's all.

Q. 19. Who has charge of that bank?

A. Mr. D. O. Lamprecht.

Q. 20. You returned the sales to him?

A. Yes.

Q. 21. Will you refresh your memory and return here and tell us what sales you made in the month of May, 1897, of the stocks of any of these plaintiff banks?

A. If I am required to do so, I will, but I don't like to. The stability of our business depends mostly upon our keeping these prices and all the doings of our house strictly within ourselves. It would not be just to disclose any of our records.

Q. 22. I do not ask the names of the parties. Give the prices only and the names of the banks.

By the SPECIAL MASTER: I will ask you to do that.

A. I haven't the authority to furnish these items. Mr. Lamprecht would have to do that.

G. N. CALVERT recalled for further cross-examination.

By Judge BOYNTON:

Q. 1. The statement you have made of the market value of shares of the various banks is founded on the newspaper report of what purports to be reported to the Comptroller of the Currency?

A. Yes, it was.

Q. 2. I believe you have already stated that you did not know

whether in that report any bad or uncollectible debts were included as good ones?

A. I believe I stated that.

F. J. SMITH, in behalf of said defendant deposes and says further as follows:

Direct examination.

By Mr. MONNETT:

Q. 1. Have you the statement that your firm made of sales of stock to any national bank preceding or succeeding the month of May 1897, and three months either way?

To which question plaintiff objected.

440 A. I have from February 18th to July 22nd.

Plaintiff objected to witness testifying to individual sales and purchase by and for Lamprecht Bros.

A. There was a sale of Union National Bank stock the date I cannot give. This is in the interval between Febru-ry 18th and July 22nd. That was 128.

Q. 2. How many shares?

A. 50 shares.

Q. 3. All in one sale?

A. Yes.

Q. 4. To one party?

A. Yes, to one party.

Q. 5. Was that an officer of the bank or a stockholder that sold that?

A. It was not an officer.

Q. 6. Was either the purchaser or seller an officer?

Plaintiff objected to witness giving names of individuals.

A. I am not required to answer that. That's confidential information. Here is 25 shares of Park national sold at 121; 25 shares Euclid Avenue nat'l at 141; 25 shares Park national, at 125; 5 shares Park national, at 120.

Q. 7. Anything else?

A. Nothing else.

CHARLES L. MURFEY, heretofore duly sworn, being produced in behalf of said defendant deposes and says as follows:

Direct examination.

By Mr. MONNETT:

Q. 1. You were heretofore sworn and testified in chief for the plaintiff, I believe?

A. Yes.

Q. 2. Did you comply with section 5211 of the Federal Statutes which requires the cashier according to the form prescribed, to fur-

nish under oath to the Comptroller of the Currency and attested by three directors, a report, and exhibit in detail and under appropriate heads the resources and liabilities of your bank at the close of business on or about March 9th, 1897?

A. Yes.

Q. 3. And in that report as published it gives your capital stock paid in one million dollars, surplus fund $200,000, undi-
441 vided profits less expenses and taxes paid $106,580.96. Was that the report made under section 5211 as required by statute?

A. Yes, to the Comptroller of the Currency.

Q. 4. Under date of May 20, 1897, you made a report to the Comptroller of the Currency under section 5211, exhibiting your resources and liabilities at the close of business on the 14th day of May, 1897, capital stock one million dollars, surplus fund $200,000, undivided profits less expenses and taxes paid $89,413.87?

A. Yes.

Q. 5. Was that correct?

A. That's correct.

Q. 6. Under the same section you purport to exhibit in detail and under appropriate heads the resources and liabilities of your bank at the close of business on July 27, 1897, certified to by three directors, in which you purport to have one million dollars capital stock, surplus fund $200,000, undivided profits less expenses and taxes paid $94,254.77. Was that the true report?

A. Yes.

Q. 7. And under section 5199 the directors of your bank may semi-annually declare a dividend of so much of the net profits of your bank as they shall judge expedient, but each association shall before the declaration of a dividend carry one-tenth part of its net profits of the preceding half year to its surplus fund till the same shall amount to 10 per cent. of its capital stock. Did you do that?

A. Yes.

Q. 8. Did you bring your surplus up to that statutory limit in 1897?

A. It was up to that limit long before.

Q. 9. Section 5204 of the Federal Statute requires you before paying any dividend to make a report of your earnings and dividends to the Comptroller of the Currency. Did you make such report in the fall of 1896 preceding the taxing month of May 1897?

A. Yes.

Q. 10. Will you please make that Exhibit A and attach it to your deposition?

A. That's a copy of our report to the comptroller.

Q. 11. Will you make us a copy and make it Exhibit A of your deposition?

A. Yes.

Q. 12. In that report you declared a dividend of three per cent., or $30,000 on one million dollars. Was that correct?

A. Yes.

442 Q. 13. And under section 5204 you made a report of earnings and dividends of May 1st, 1897, and declared a dividend of three per cent., $30,000?

A. Yes.

Q. 14. Was that correct?

A. Yes.

Q. 15. The statute referred to requires your bank, before it can declare a dividend to charge off any losses it had prior to that time sustained, equal to or exceeding its undivided profits then on hand. Did you do that?

A. What date was that—no, sir, there were no losses charged off at that time.

Q. 16. The report is true is it not?

A. Yes.

Q. 17. And it says further that no dividend shall ever be made by any such bank while it continues its banking operations, to an amount greater than its net profits then on hand, after deducting its losses. Did you do that?

A. There was no deduction made for bad debts.

Q. 18. Did you have any bad debts within the meaning of that statute?

A. Yes, I think so, at the time.

Q. 19. The Federal Statutes forbids your declaring a 3 per cent. dividend if you had any bad debts or losses. Did you make that dividend contrary to the statute?

A. We took it out of our undivided profits what we were short, and the surplus was left intact.

Q. 20. According to that you had an amount of net profits undivided to be carried forward of $94,650.06, after taking out the $30,000 dividend. And in that report you say you had no bad debts or decrease of values since your last report?

A. We had had debts but they were not charged off.

Q. 21. Bad debts are defined by the Federal Statute as debts due to the association on which interest was past due and unpaid for a period of six months, unless the same was well secured and in process of collection. Were your bad debts not well secured and not in process of collection, those that you concealed from the Comptroller of the Currency when you declared this dividend?

A. They were carried along as a liability. There was no report made of them.

Q. 22. You treated them as assets?

A. Yes.

Q. 23. Were they still on hand and treated as assets during that taxing year up to October 31, 1897, when you made your second report?

A. They were treated as an asset.

443 Q. 24. They were not a bad debt within the meaning of the Federal statute, were they?

A. The bank wanted to charge them off, but they deferred charging them off until later.

Q. 25. You did not charge them off during that entire taxing year, did you?

A. We charged them off last spring.

Q. 26. You declared a dividend on net earnings and profits of three per cent., and yet after that division you had under section 5204 $84,800 left, did you not, from the fall of 1897?

A. Yes, we had undivided profits on hand $84,000.

Q. 27. These reports were true, were they not?

A. Yes, that's the condition of the bank.

Q. 28. Did you have any moneyed capital personally that you returned for taxation in the year 1897?

A. No, sir.

Q. 29. Did you know anybody connected with your bank that returned moneyed capital at less than its true value in money?

A. No, sir.

Q. 30. Did you know anybody in Cleveland that did?

A. I did not.

Cross-examination of CHARLES L. MURFEY.

By Judge BOYNTON:

Q. 31. In making your report to the county auditor in the month of May, 1897, how much did your bank deduct for bad debts?

To which question defendant objected because the sworn report to the Comptroller of the Currency shows the exact amount.

A. We deducted $20,000.

*books?*

Q. 32. That was all?

A. Yes.

Q. 33. You may state whether your report to the Comptroller of the Currency exhibits the face of your books?

To which question defendant objected because the statute requires for them to exhibit their true resources under appropriate heads, and the liabilities of their association.

A. Yes.

Q. 34. And if any debts that are actually bad have not been charged off, they go into that report as assets?

A. Yes.

444 Redirect examination of CHARLES L. MURFEY.

By Mr. MONNETT:

Q. 35. The State statute requires you as cashier to make out and return to the auditor of Cuyahoga county under section 2765 on the second Monday of May annually and report in duplicate under oath, exhibiting in detail and under appropriate heads the resources and liabilities of such bank at the close of business on the Wednesday next preceding the second Monday. Did you do that?

A. Yes.

Q. 36. They are using exactly the same language and practically the same date. How do you account for the difference?

A. We made a deduction to the auditor of Cuyahoga county. We deducted $50,000 for the depreciation of our property at the present bank on Superior street. It depreciated from $500 to $1,000 a foot during the last three years. We deducted $50,000 for the depreciation of real estate. And we deducted $20,000 for doubtful paper. Since that report the bank has charged off $84,000 of bad paper last spring.

By Judge BOYNTON:

Q. That they had on hand at that time in 1897?

A. Yes.

Q. 37. But in October, 1897, following the report to the auditor of Cuyahoga county in May, 1897, you swore in the return to the Comptroller of the Currency that you had no bad debts. How do you account for that?

A. We charged them off since that report. They didn't ask us whether we had any bad debts. We didn't charge them off. We carried these along as doubtful paper at that time, but it showed on our books as assets.

Q. 38. You mean to say when you made your October report to the Comptroller of the Currency you had bad debts past due and unpaid without security that you treated as valid assets?

A. We showed to the Comptroller of the Currency the amount of past-due paper at that time. They did not call it a bad debt. It showed as past-due paper. We had to give a report of the condition of the bank.

Q. 39. On your affidavit that there was no bad debts in October, 1897, under section 5204, you answered the question "Losses sustained through bad debts and decrease of values—nothing"?

A. We hadn't charged them off then. There had been no entry made.

445 Q. 40. Yet you had sworn six months before that to the auditor of Cuyahoga county that there was $84,000 of bad paper?

A. $50,00- of that was real estate.

By Judge BOYNTON:

Q. And I understand you that later on you charged off $80,000 of bad paper that you had on hand at the time you made your return to the auditor?

A. Yes. We always made return to the county auditor just as we did to the Comptroller of the United States.

Said exhibits referred to by this witness are hereto attached and marked for identification Defendant's Exhibit Murfey A, B and C, respectively, and the same are made a part of this deposition.

Further hearing adjourned until 2 p. m. of this day, November 29th, 1898.

DEFENDANT'S EXHIBIT MURFEY A.

Copy 1.

*Report of Earnings & Dividends of the Mercantile National Bank for Six Months Ending Oct. 31st, 1896. Declared Oct. 30th. Payable Nov. 2nd, 1896.*

| | | | |
|---|---|---|---|
| Losses sustained | | Gross earnings | 74,543 72 |
| Expenses and taxes paid | 40,906 67 | Other profits | 554 66 |
| Net earnings | 34,191 71 | | |
| | 75,098 38 | | 75,098 38 |
| Dividend of 3 per cent. on $1,000,000 | 30,000 00 | Net earnings for six months | 34,191 71 |
| Am't net profits carried for'd | 99,616 55 | Undivided profits from last report | 95,124 84 |
| | 129,616 55 | | 129,616 55 |
| Total surplus | 200,000 00 | Total profits since organization | 989,616 55 |
| Total dividends | 690,000 00 | | |
| Total other profits on hand | 989,616 55 | | 989,616 55 |

DEFENDANT'S EXHIBIT MURFEY B.

Copy 1.

*Report of Earnings & Dividends of the Mercantile National Bank for Six Months Ending May 1st, 1897. Declared April 30th, 1897. Payable May 3rd, 1897.*

| | | | |
|---|---|---|---|
| Losses sustained | | Gross earnings | 68,558 44 |
| Expenses and taxes paid | 43,524 93 | Other profits | |
| Net earnings | 25,033 51 | | |
| | 68,558 44 | | 68,558 44 |
| Dividend of 3 per cent. on $1,000,000 | 30,000 00 | Net earnings for six months | 25,033 51 |
| Am't net profits carried for'd | 94,650 06 | Undivided profits from last report | 99,616 55 |
| | 124,650 06 | | 124,650 06 |
| Total surplus | 200,000 00 | Total profits since organization | 1,014,650 06 |
| Total dividends | 720,000 00 | | |
| Total other profits on hand | 94,650 06 | | |
| | 1,014,650 06 | | 1,014,650 06 |

446 DEFENDANT'S EXHIBIT MURFEY C.

Copy.

*Report of Earnings & Dividends of the Mercantile National Bank for Six Months Ending Oct. 31st, 1897. Declared Oct. 29th, 1897. Payable Nov. 1st, 1897.*

| | | | |
|---|---|---|---|
| Losses sustained | | Gross earnings | 61,543 21 |
| Expenses and taxes paid | 41,392 94 | Other profits | |
| Net earnings | 20,150 27 | | |
| | 61,543 21 | | 61,543 21 |

| | | | |
|---|---|---|---|
| Dividend of 3 per cent. on $1,000,000 | 30,000 00 | Net earnings for six months. | 20,150 27 |
| Am't net profits carried for'd | 84,800 33 | Undivided profits from last report | 94,650 06 |
| | 114,800 33 | | 114,800 33 |
| Total surplus | 200,000 00 | Total profits since organization | 1,034,800 33 |
| Total dividends | 750,000 00 | | |
| Total other profits on hand. | 84,800 33 | | |
| | 1,034,800 33 | | 1,034,800 33 |

UNITED STATES OF AMERICA,
*Northern District of Ohio, Eastern Division.*

I, Irvin Belford, special examiner to take testimony under the 67th rule, as amended, and under and by virtue of a decretal order in the case of The Mercantile National Bank of Cleveland, Ohio, complainant, against R. S. Hubbard, as treasurer of Cuyahoga county, Ohio, respondent, pending in the circuit court of the United States within and for the northern district of Ohio, made and entered on the 11th day of August, A. D. 1898, do hereby certify that the witnesses,

Theodore M. Bates,
Albert E. Akins,
John Van Nostran,
James Molyneaux,
Norton T. Horr,
Edwin R. Perkins,
S. E. Williamson,
Thomas H. Wilson,
J. J. Sullivan,
W. G. Mather,
James Barnett,
W. S. Tyler,
Orville L. Jones,
A. L. Withington,
William Bingham,
447 Joseph Colwell,
J. E. Marks,
B. A. Hinsdale,
Frank Salisbury,
Luther F. Lyman,
Peter R. Fahey,
G. N. Calvert,
C. F. Farnsworth,
S. C. Hale,
Frank J. Smith,
F. J. Woodworth,
T. W. Hill,
F. J. Smith,
E. R. Date,
Geo. S. Russell,

Thos. H. Wilson,
H. R. Sanborn,
Charles L. Murfey,
F. R. Rittman,
J. J. Sullivan,
E. H. Bourne,
William P. Johnson,

whose depositions appear in the foregoing pages of volumes 1, 2, 3 & 4, were by me each severally duly sworn to testify the truth, the whole truth, and nothing but the truth. That said depositions were, at the request of both parties, under my direction taken down in shorthand by S. Louise Patterson, a skillful stenographer, approved by both parties, and by said stenographer thereafter put into typewriting. That said depositions were read over and examined by the solicitors interested therein, and now by agreement and stipulation of counsel for said parties the signatures of said witnesses to their testimony were waived and it was further stipulated that said depositions so far as competent, may be read in evidence the same as if they had been duly subscribed by said witnesses.

Said depositions were taken in pursuance of notices to the solicitors for the parties to said suit as to the first day therein stated, and thereafter by adjournment and agreement of parties on the several days therein named at the office of the clerk of the United States circuit court, northern district of Ohio, in the city of Cleveland, Ohio.

That the parties were represented at the taking of said depositions by their respective counsel as set forth.

That the documentary testimony and exhibits recited, were offered in evidence and marked as specially noted in the foregoing
448 depositions; and that I am not counsel or relative of either party or otherwise interested in the event of this suit.

In testimony whereof, I have hereunto set my hand this 14th day of February, anno Domini, 1899.

IRVIN BELFORD,
*Special Examiner.*

NOTE.—This stipulation refers to the testimony of county auditors, excluded by stipulation of counsel.

*Stipulation.*

The above depositions, ten in number, having been taken for the purpose of showing the practice and custom of the various county auditors in listing moneyed capital for the purpose of taxation and also shares of incorporated banks for the year 1897 and for the purpose of showing that no other rule of practice or custom was adhered to in said counties being in all the other counties outside of the county of Cuyahoga, for the valuation of moneyed capital, than that set forth in the Revised Statutes of Ohio; further taking of proof herein is hereby dispensed with upon the agreement to the following stipulations, that is to say:

It is agreed, if the court holds it competent to put in proof of taxation of moneyed capital and bank shares outside of Cuyahoga county, that there is no discrimination for counties outside of the county of Cuyahoga in the State of Ohio, by the taxing officers of said counties in fixing the valuations for the purpose of taxation upon moneyed capital as against shares in incorporated banks.

2nd. It is further agreed that table 11, found in the report of the auditor of State for the year 1897, on pages 326, 327, 328, 329, 330, 331, 332, 333 and 334, may be taken as evidence as to the returns made by the individual county auditors of the valuation of national banks of the State board for the equalization of bank shares for the year 1897 and the percentage that was adopted by said auditors in making return to said State board, and also of the value fixed by said State board and for all other purposes for which the same may be competent. The above parol testimony of witnesses to be considered in connection with the proof offered relating to the valuation of national bank shares and other moneyed capital in the county of Cuyahoga, if the same shall be held competent. This stipu-
449 lation is not to bar the introduction of further or other proof along the line of the issues as presented by the pleadings except the evidence of the individual auditors of the several counties outside of the county of Cuyahoga.

W. W. BOYNTON,
*Att'y for Pl'ff.*
F. S. MONNETT,
*Att'y General, for Def'ts.*

In the United States Circuit Court for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, Plaintiff,
*vs.*
R. S. HUBBARD, Treasurer of Cuyahoga County, Ohio, Defendant.

DECEMBER 26TH, 1898.

*Transcript of Testimony.*

In accordance with the stipulations hereinbefore entered into, the testimony of Hon. W. D. Guilbert, auditor of State, is hereupon taken.

Present: W. W. Boynton. F. S. Monnett, att'y general & S. W. Bennett.

W. D. GUILBERT testified as follows:

Q. State your name and occupation.
A. W. D. Guilbert, auditor of State.
Q. How long have you occupied the position of auditor of State?
A. Since the second Monday of January, 1896.
Q. As such official, were you a member of the State board known as the board for the equalization of the shares of incorporated banks under section 2808, Revised Statutes.

A. Yes, sir.

Q. Who composed that board during the term in which you were a member of it?

A. Hon. Asa S. Bushnell, governor; Hon. S. F. Monnett, attorney general, and myself.

450 Q. About how many national banks were there in the State of Ohio to be equalized under the duties imposed upon said board for the year 1897?

A. I think about 240.

Q. Had they made their returns to your board for the purpose of equalization under section 2808 in that year, and if so, covering what period did the plaintiff banks file their report, was it the same as shown in the testimony of G. W. Taylor?

A. I cannot give definite dates but they were not all in at the time of the first meeting of the board, which was on the third Tuesday of June.

Q. You may state if there were other banks of the State that had not yet made their returns to this board?

A. Yes, sir; a number of others had not returned at that time.

Q. What was the custom as well as the action of the said board in such cases when the returns had not been forwarded at the statutory time for the first meeting, as far as you know as a member of said board or otherwise?

Counsel for plaintiff banks objected to the question so far as it related to the custom.

A. The members of the board would meet on the 3rd Tuesday of June and organize and after the organization would adjourn until all the returns were filed in this office.

Q. How long had you been a deputy or assistant in the State auditor's office prior to the time you were elected auditor?

A. Eight years.

Q. And has this custom of adjourning from time to time obtained to your knowledge during that period so far as the equalization of banks were concerned?

Counsel for plaintiff banks objected to the above question because it was irrelevant.

A. Yes, sir.

Q. Have the plaintiff banks been aware of that custom and construction of the statute given by the board in its actual workings in the last eight years, by appearing at different times during the year subsequent to the third Tuesday of June as indicated by the statute?

Objection by counsel for plaintiff banks for the reason that it is calling for an opinion and as otherwise irrelevant.

A. I think so.

Q. Or putting it more plainly have the plaintiff banks or any of them during the last eight years, to your knowledge, ever

451 appeared on the first day named by the statute, to wit, the

third Tuesday of June, for the purpose of equalizing their returns or having a hearing upon the equalizing of their returns?

A. They have not.

Q. What has been the mode or the manner in which said plaintiff banks have during the last eight years, appealed to this board for the purpose of complaint or being heard upon any of their returns, was it by notifying you or some member of the board between the third Tuesday in June and some time in December that they wished to be heard. Just state in what way and manner they themselves have treated the powers of this board?

Objected by counsel for plaintiff banks as indefinite and irrelevant and suggestive in its character.

A. Some time during the latter months of 1897 they — requested by correspondence to appear before the board. The custom has been usually to apply to the auditor of State for an opportunity to appear before the board.

Q. Any time from June to December, or between what dates?

Objection by counsel for plaintiff banks as leading.

A. Usually between the date of the first meeting of the board and prior to their *sine die* adjournment.

Q. What has been the usual time in the last eight years that the board has adjourned *sine die?*

(Objection.)

A. I cannot give definite dates but I think they have been as late as November.

Q. There was some question raised or criticism made in the testimony taken by the plaintiffs of Mr. Taylor, the secretary of the board, as to the entries upon the minutes of the board using the term "board adjourned," you may state what is the interpretation of that term as used by the board, did it mean *sine die*, or had it any other understood meaning, both by the boards or banks for the last eight years?

Objection by counsel for plaintiff banks on the ground that the record discloses that fact that the board adjourned to meet at the call of its secretary and not merely board adjourned.

A. It did not mean a *sine die* adjournment but it was understood to be a recess. In other words to be called together from time to time after the reports were received and the requests from the various banks for a hearing.

Q. Section 2809 of the Statutes of Ohio provide that your board shall hear complaints and equalize the value of said shares
452 according to rules prescribed and as set forth in said statute, and further provides that your board shall not increase or reduce the grand aggregate value of bank shares as returned by the several county auditors by some 20 per cent. I will ask you if the total amount or increase to the grand aggregate value of bank shares

as returned by the several county auditors was more than 20 per cent. for the year 1897?

A. No, sir; it did not equal 20 per cent.

Q. Was there any complaint filed from the third Tuesday of June until the adjournment *sine die* of this board by any of the plaintiff banks. I refer to the board for the equalization of the shares of incorporated banks in this question?

A. No, sir.

Q. Did any of said banks ask to have any kind of a hearing prior to the adjournment *sine die* in a period of almost five months?

A. No, sir.

Q. Did this board for the equalization of bank values attempt to equalize the value of anything but bank shares during the sessions of 1897?

A. No, sir.

Q. Were you also during the year 1897 by virtue of your position as State auditor a member of the board of tax revision organized under section 167 of the Revised Statutes of Ohio?

Objection by counsel for plaintiff banks because there is no such board.

A. Yes, sir; I was a member of that board.

Q. Do you remember of a committee representing the plaintiff banks appearing at your office to inquire about the action of the board for the equalization of bank values with regard to the action taken on the value of their bank shares?

A. Yes, sir; a committee of Cleveland banks called on our board for that purpose.

Q. State what took place between said committee and said board with regard to submitting their claims for reduction, grievances or errors claimed, to the board as organized under section 167 of the Ohio Statutes?

A. The board informed the committee that it was too late to give a hearing and relief as a State board of equalization for banks, for the reason that the board had adjourned *sine die*, but that we would give them a hearing under section 167.

Q. State whether you then offered to convene said board of tax revision organized under section 167 to consider the case of the various plaintiff banks?

453 A. Yes, sir; we offered to convene the tax revision board at such time as might be convenient for the representatives of the Cleveland banks to appear.

Q. Do you remember what their answer was to the proposition so made, or why, if at all, they refused to submit their case to the consideration of said board of tax revision for hearing?

A. I do not remember all that was said in regard to action by the board under section 167, but some doubt was expressed by some of the members of the committee that the board would not have the power under section 167 to afford as full relief as the board of equalization.

Q. State what the fact is as to whether they did or did not submit

their case and grievances and alleged errors before said board of tax revision?

A. Only one of the Cleveland banks appeared before the board and that was Mr. Wilson, of the First national the others did not. The others declined under the advice of counsel.

Cross-examination.

Examined by Judge BOYNTON:

Q. Did the board or any member of it cause any notice to be given to the Cleveland banks of the date of any meeting on which the cases of the Cleveland banks would be considered by the board of equalization?

A. I believe not.

Q. The committee that came down from Cleveland to have an interview with the board, reached here on some of the last days of December did they not?

A. That is my recollection.

Q. Previous to the coming of the committee in the latter part of December the board for the equalization of bank shares had adjourned *sine die*, had it not?

A. Yes, sir.

Q. Did, or did not, that committee request a hearing before the board for the equalization for their banks, and were they not informed that such a hearing could not be had, but that you would hear them as a board of remission under 167?

A. They were so informed by the board, because they had come after the *sine die* adjournment.

Q. Can you give us the date on which the *sine die* adjournment of the board took place in 1897?

A. I do not remember the date it was a matter of record. It was some time prior to the coming of the Cleveland committee.

454 Redirect examination.

Examined by General MONNETT:

Q. Mr. Auditor, under section 166 of the Revised Statutes of Ohio, it is made your duty, I believe, to prepare and transmit to the auditors of the several counties in the State such forms of returns to be made by them to your office and such instructions upon any subject affecting the State finances as is fully set out in that section; and did you under said statute or any other authority prepare blank forms for the auditors to transmit to the plaintiff banks together with all other incorporated banks of the State upon which to make said returns, and if so will you furnish to the notary a copy thereof and mark it Exhibit "A"?

A. Yes, sir, I prepared and furnished form 32–1000 to the auditor of plaintiff's county and all other counties of the State, which form is submitted and marked Exhibit "A."

Q. You may state whether the form you have just described was used in the year 1897 by the auditor of Cuyahoga county and

whether it was used by the plaintiff banks in making their returns?

A. Yes, sir; the form was used in 1897.

Q. And were they sent out prior to the third Tuesday in June?

A. Yes, sir; they are always sent out the latter part of April or early in the month of May, and were in 1897.

Recross-examination.

Examined by Judge BOYNTON:

Q. You may state whether or not the assessor's blank that I have put into your hands is the form that you sent out for tax-payers generally for the year 1897?

A. The same thing, yes, sir.

Q. Will you make that a part of your deposition and mark it Exhibit "B"?

A. Yes, sir.

And thereupon said blank was marked Exhibit "B."

Q. I notice that number 14 on the blank marked Exhibit "B" reads as follows: "Value of all credits as defined by law, section 2730, including mortgages real and chattel," and also "all money loaned on pledge of real estate, although a deed or other instrument may have been given for the same, if between the parties the same is considered as security merely" (see section 2734), "deducting therefrom the sum of all legal *bona fide* debts, except
455 such as are not allowed by law to be deducted. (Section 2730.) (Debts may be deducted only from credits.)" Is that your formulation for returning all credits?

A. Yes, it is the formulation in compliance with the statute for returning credits for taxation.

Redirect examination.

Examined by General MONNETT:

Q. We ask you to have the tax notice of unincorporated banks attached as Exhibit "C."

A. Yes, sir.

And thereupon said tax notice was marked Exhibit "C" and made a part hereof.

W. D. GUILBERT.

It is hereby stipulated that letters to the board or any members of this board of equalization for bank shares, from any officers of the plaintiff banks concerning the subject-matter of this suit, can be hereafter read in evidence, subject to objection for irrelevancy or incompetency by either party.

F. S. MONNETT,
*Att'y General.*
W. W. BOYNTON.
*Att'y for Pl'ff.*

Fees for taking deposition:
Clara M. Carey—$7.50.

Form 32—1000.

Forms for bank statements, in duplicate, under provisions of sections 2762, 2763, 2764, 2765, 2766, 2767, 2768, and 2769, and amended sections 2766, 2808, 2809, 2810, Revised Statutes of Ohio. See O. L., vol. 80, pp. 54 and 55.

*Banks or Banking Associations Organized under the Laws of the State of Ohio or of the United States.*

To the cashier of the — bank, ——, Ohio.

SIR: You are hereby required to make out upon the forms herewith, and return to me at my office, at ——, in the county of ——, Ohio, on or before the second Monday of May, A. D. 189–, a report in duplicate, under oath, exhibiting in detail the resources
456 and liabilities of the above bank or banking association, at the close of business on the first Wednesday after the first Monday of May preceding such report, together with a full statement of the names and residences of stockholders therein, with the number of shares held by each, and the par value of each share. You are also required to accompany this return with a copy of the report to the Comptroller of the Currency, made next prior to the second Monday of May, 189–.

Dated —— —, 189–.

——— ———,
*Auditor of —— County, Ohio.*

*Resources.*

| | |
|---|---|
| Loans and discounts | |
| Overdrafts | |
| U. S. bonds to secure circulation | |
| U. S. bonds to secure deposits | |
| U. S. bonds on hand | |
| Other stocks, bonds and mortgages | |
| Due from approved reserve agents | |
| Due from other banks and bankers | |
| Real estate, furniture and fixtures | |
| Current expenses and taxes paid | |
| Premiums paid | |
| Checks and other cash items | |
| Exchanges for clearing-house | |
| Bills of other banks | |
| Fractional currency | |
| Specie | |
| Legal-tender notes | |
| U. S. certificates of deposit | |
| Due from U. S. Treasurer | |
| Total | |

*Liabilities.*

Capital stock paid in.....
Surplus fund.....
Other undivided profits.....
National bank notes outstanding.....
State bank notes outstanding.....
457 Dividends unpaid.....
Individual deposits.....
United States deposits.....
Deposits of U. S. disbursing officers.....
Due to other national banks.....
Due to State banks and bankers.....
Notes and bills rediscounted.....
Bills payable.....

Total.....

GUILBERT EXHIBIT A.

The par value of each share of stock in this bank is — dollars, and the appraised value (for taxation) of the real estate owned by the bank is — dollars. See affidavit upon third page of this report.

—— ——, *Cashier.*

| Names of stockholders. | Residences. | No. of shares. |
|---|---|---|
| Amount carried forward..... | | |

*Statement*—Continued.

| Names of stockholders. | Residences. | No. of shares. |
|---|---|---|
| Amount brought forward..... | | |
| Total number of shares..... | | |

*Affidavit.*

THE STATE OF OHIO, }
—— *County,* } *ss:*

I, —— ——, cashier of — bank of ——, Ohio, do solemnly swear that the foregoing is a correct statement of the resources and liabilities, of the names and residences of the stockholders, of the number of shares held by each, of the par value of the shares of said bank at the close of business on the first Wednesday after the first Monday of May, 189–.

—— ——, *Cashier.*

Sworn and subscribed to before me, a — in and for said county, this — day of —— 189–.

—— ——.

(In duplicate.)

458 Office of the auditor of —— county.

——, Ohio, ——, 189–.

To the State board of equalization for incorporated banks:

I hereby certify that I have fixed the value of the shares of — Bank of —— for the year 189–, as follows:

— shares of par value of $—..... $
From which is to be deducted the value of the real estate owned by said bank which stands upon the duplicate at..

Leaving taxable valuation of shares at..... $

—— ——,
*Auditor —— County, Ohio.*

This return to be made to the auditor of State for the use of the State board of equalization of incorporated banks on or before the 10th day of June.

Annual statement of the — Bank of ——, —— county, Ohio. —. Received at the county auditor's office, —— 189–.

Guilbert Exhibit "B."

Form 39.

*Tax Notice for* 1899.

To —— ——.

You are notified to make out and hold in readiness for me a statement, in the following form, of all personal property, moneys, credits, investments in bonds, stocks, joint stock companies, annuities, or otherwise, in your possession or under your control as owner or holder, or as husband, parent, guardian, trustee, executor, administrator, receiver, accounting officer, agent or factor, or otherwise, in the township, city or village in which you reside, or did reside, on the day preceding the second Monday of April, 1890 (as per rule VI, next page). You will also be prepared to furnish the statistics of crops, etc., indicated by the schedule on the last page of this notice.

Dated —— —, 1890.

—— ——, *Assessor.*

459 *Statement of Personal Property, Moneys, Credits, &c., Subject to Taxation in —— for the Year* 1890, *Belonging to —— ——, and Listed by —— ——.*

| | Number. | Total value. |
|---|---|---|
| 1. Horses..... | | |
| 2. Cattle..... | | |
| 3. Mules and asses..... | | |
| 4. Sheep..... | | |
| 5. Hogs..... | | |
| 6. Pleasure carriages of whatever kind and bicycles... | | |

| | | Value, dollars. |
|---|---|---|
| 7. | Value of household goods and furniture of every kind, gold and silver plate, chinaware, books, pictures and paintings..... | |
| | (*a.*) All jewelry of gold and silver, and all pins, rings, necklaces, bracelets or other articles of jewelry set or embellished with diamonds, emeralds, rubies, or other precious stones, or with pearls or other valuable settings..... | |
| | (*b.*) Farming utensils, wagons, carts, carriages, etc. | |
| | (*c.*) Grain, wool, hives of bees, agricultural products of every kind..... | |
| | (*d.*) Lumber, coal, wood and stone..... | |
| | (*e.*) Vessel or vessels or share in such vessels, steamboats, canal-boats or shares in such boats..... | |
| | (*f.*) Office furniture and fixtures, iron safes, etc., etc. | |
| | (*g.*) All other articles of personal property not included in any of the foregoing or subsequent items of this statement..... | |
| | Total amount of item seven..... | |

| | | Number. |
|---|---|---|
| 8. | Watches..... | |
| | 9. Piano-fortes and organs..... | |
| 460 | 10. Average value of all goods and merchandise owned or held by me as a merchant during the year or part thereof, ending the day preceding the second Monday of April, 1899. See section 2740. See rule 4, next page..... | |
| 11. | The value of the property which such person is required to list as a banker, broker or stock-jobber. See section 2737..... | |
| 12. | Average value "of all articles purchased, received or otherwise held by me as a manufacturer, for the purpose of being used, in whole or in part, in any process or operation of manufacturing, combining, rectifying or refining," during the year, or part thereof, on the first day of April, 1899. See O. L., vol. 88, page 341. See rule 5, next page..... | |
| | (*a.*) Average value of all articles on hand during the year or part thereof previous to the first of April, 1899, which have been by me manufactured or changed in any way, either by combination, rectifying, refining or adding thereto..... | |
| | (*b.*) Value of all tools, implements, engines and machinery used, or designed to be used in manufacturing, except such as are appraised as part of the real estate..... | |
| | Total amount of item twelve..... | |

13. Value of all moneys, in possession or on deposit, subject to order on the day preceding the second Monday of April, 1899.....

14. Value of all credits as defined by law, section 2730, including mortgages, real or chattel, and also "all money loaned on pledge of real estate,
461 although a deed or other instrument may have been given for the same, if between the parties the same is considered as security merely," (see sec. 2734), deducting therefrom the sum of all legal *bona fide* debts, except such as are not allowed by law to be deducted. (Section 2730.) (Debts may be deducted only from credits).....

The stock or shares of individuals in building and loan associations must be listed as credits and included in this item, at their true value in money, on the day preceding the second Monday in April in each year. (See section 3836–7, O. L., v. 88–469.)

Total of all taxable credits.....

Less deduction for debts (debts can only be deducted from item 14.).....

Total of item fourteen, after deducting debts.....

15. The amount of all moneys invested in bonds, stocks, joint stock companies, annuities or otherwise.....

16. The average amount or value, for the time he held or controlled the same within the preceding year, of all moneys, credits or other effects, within that time invested in or converted into bonds or other securities of the United States, or of this State, not taxed, except greenbacks, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April, but no indebtedness created by the purchase of said bonds or securities shall be deducted from the credits in the 14th item as above.....

Number.

462 17. Value of all dogs where owner fixes a value. (The owner may fix any value he chooses, but is not required to swear to it.)

Grand total of all items.....

18. Number of dogs. Males over three months old must be listed by owner or assessor.....
19. Number of dogs. Females over three months old must be listed by owner or assessor.....

Have you erected any new buildings since April 10, 1898?
On what lot or land situated?
Kind of building?
Cost of same, $
Value for taxation, $
Did you make any additions to or improvements on any building since April 10, 1898?
On what lot or land situated?
Kind of building?
Cost of same, $
Value for taxation, $
Was any building owned by you wholly or partially destroyed or removed since April 10, 1898?
On what lot or land situated?
Duplicate value,

Printed on margin:

If the person required by law to list, refuses or neglects to swear to the number and value of the property embraced in the first nine items or the correctness of the number, if exhibited, or refuses or neglects to list and swear to the number and value of the whole or of any of the other items in the list, when requested to do so by the assessor, the assessor will then make the return from his own knowledge, or from information of others, and will enter on the margin of the list, "Refused to list," or "Refused to swear," as the case may be, to which return the auditor will add fifty per cent. as penalty.

In making up your return on this blank give amounts in dollars only.

463 THE STATE OF OHIO, } *ss:*
—— *County,* }

I, (*a*) —— —— do solemnly (*b*) — that the foregoing statement contains, as it actually existed on the day preceding the second Monday of April, 1898, a true account of all the taxable personal property, moneys, credits and investments in bonds, stocks, joint stock companies, annuities or otherwise, owned or controlled by me, for my own use, or as husband, parent, guardian, trustee, executor, administrator, receiver, accounting officer, agent, factor or otherwise, and also of all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, held for myself or any one residing in this State, for whom I am required by law to list by any party residing in or out of this State, and not listed for taxation in pursuance of law, in this State by me, and every interest and right, legal or equitable, of my own and of those for whom I am required by law to list in any bonds, stocks, joint stock companies, or otherwise, which I am required by law to list for taxation, and that the value

affixed to each of said items is the value thereof as ascertained by the usual selling price thereof for cash, at voluntary sales thereof, at this time and place; and (there being no usual selling price) then at such price as could be obtained therefor in money, at this time and place, and that I have not made any acknowledgment or agreement, or contracted any debt, without receiving an adequate consideration therefor, or resorted to any device, or created any trust, or sold or exchanged or disposed of any money, property or effects, which were taxable in this State, for U. S. bonds or other non-taxable securities or moneys, for the purpose of evading taxation or diminishing the amount of my return for taxation, and that all interest that I have or own in any credit or evidence of indebtedness, secured in any manner, upon real estate or personal property, situated outside of this county, or in any taxable stocks or bonds, or in any stocks or bonds of any foreign corporation, has been duly listed by me for taxation.

——— ———,
*No.* — ——— *Street.*

P. O. ———.

Sworn to and subscribed before me, this — day of ———, 1898.
——— ———, *Assessor.*

(*a.*) This blank must be filled with the name of the person making the affidavit.
(*b.*) This blank must be filled with the word "swear" or "affirm."

464 *Rules for Valuing Personal Property.*

I. Section 2739 of the general tax law that took effect January 1, 1880, declares: "Personal property shall be valued at the usual selling price thereof, at the time of listing, and at the place where the same may then be, and if there be no usual selling price known to the person whose duty it shall be to fix a value thereon, then at such price as it is believed could be obtained therefor in money, at such time and place. Investments in bonds, stocks, joint stock companies, or otherwise, shall be valued at the true value thereof in money." Money, whether in possession or on deposit in banks, or with persons, subject to draft on demand, shall be entered in the statement at the true value thereof. The balance of all credits (after deducting the legal *bona fide* indebtedness of the person listing,) payable either in money, property of any kind, labor or service, shall be estimated, in making up the statement, at its true value, which is the amount that can be collected. Annuities, or moneys receivable at stated periods, shall be valued at the price which the person listing the same believes them to be worth.

II. Each individual residing in this State may deduct a sum not exceeding one hundred dollars as exempt from taxation; but all above that amount must be returned to the assessor. But in families, this applies only to the head of the family, unless the other members own separate property independent of such head.

III. The necessary wearing apparel, and all articles of food provided for the present use and support of an individual or family, are not to be regarded as objects of taxation. (This is limited to provisions for the individual or family, and does not include food for cattle or stock.)

IV. Merchants must include in their statements the monthly average value of their goods and merchandise. It is the average of the merchant's proper- in his business during the preceding year, or part thereof, and not the value of the capital employed, that must be returned.

V. Manufacturers must include in their statements the monthly average value of all articles purchased, received, or otherwise held, for the purpose of manufacturing, combining, rectifying or refining, which from time to time they shall have had on hand during the year next previous to the time of making such statement, if so long they shall have been engaged in business, and if not, then during the time they shall have been so engaged. All material, of every description, held for the purpose of adding to the value thereof
465 by any process or operation of manufacturing, combining, &c., is the manufacturers' raw material, and he is to return for taxation the monthly average value of the same, which he had on hand during the preceding year, in the same condition in which it was purchased or received. He is also required to return the monthly average value of all articles which were at any time by him manufactured, or changed in any way, either by combination, or rectifying, or refining, or adding thereto, which from time to time he shall have had on hand during the year next previous to the first day of April annually; if so long, he shall have been engaged in such manufacturing business, and if not, then during the time he shall have been so engaged, with the value of tools, implements, engines and machinery used in manufacturing, except such as are appraised as part of the real estate to be returned in separate items. So much of the manufacturers' property as is required to be returned by this rule, under item 12, together with the values returnable under other items of the tax notice, make up the values to be returned by the manufacturer, and not the capital employed in his business.

VI. All personal property upon farms, and merchants' and manufacturers' stock must be returned for taxation, and taxed in the township and town in which they are situated. But moneys and credits must be entered for taxation in the township and town in which the person charged with the tax thereon resided at the time of the assessment.

VII. No person is required to include in his statement of any share or portion of the capital stock or property of any company or corporation, whose duty it is, by law, to list and return its capital and property for taxation in this State.

VIII. A refusal to swear to the value of personal property included in the first nine items of the statement does not render it liable to the penalty of fifty per cent. provided the owner thereof makes oath that he has fully and correctly exhibited said property

to the assessor, and has made oath as to the other items of the statement.

IX. Unless the value of the property listed is sworn to, the assessor shall not be governed by the amounts at which the owner may wish them returned; but shall fill the statement by placing opposite each kind of property such an amount as he believes to be its full value. Neither shall the assessor return any property at less than its true value, in consideration of the fact that the penalty is to be added, because its owner "refused to swear."

466 *Form of Oath or Affirmation Where There is no Property Exceeding One Hundred Dollars in Value.*

(The assessor must administer this oath to all who claim not more than one hundred dollars in value.)

I do solemnly — that I do not own, hold, possess, or control any personal property, moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, which are by the laws of Ohio subject to taxation, or which I am by law required to list in my own right, or as the holder thereof; or otherwise.

—— ——.

Sworn to and subscribed before me, this — day of ——, 1898.

—— ——, *Assessor.*

*Crops of* 1897 *and Other Statistics.*

Bonds, &c., exempt from taxation—Amount now owned or held of all United States bonds, bonds of the State of Ohio, certificates of indebtedness, that are exempt from taxation by any law of the United States or of this State..... $

Wheat—Number of acres sown for crop of 1897.....
Number of bushels produced in 1897.....
Number of acres sown for harvest of 1898.....
Rye—Number of acres sown for crop of 1897.....
Number of bushels produced in 1897.....
Number of acres sown for crop of 1898.....
Buckwheat—Number of acres sown in 1897.....
Number of bushels produced in 1897.....
Oats—Number of acres sown in 1897.....
Number of bushels produced in 1897.....
Number of acres sown for crop of 1898.....
Barley—Number of acres sown for crop of 1897.....
Number of bushels produced in 1897.....
Number of acres sown for crop of 1898.....
Corn—Number of acres planted in 1897.....
Number of bushels produced (as shelled) in 1897.....
Number of acres in corn for 1898 (estimated).....
Broom-corn—Number of acres planted in 1897.....
Number of pounds of broom brush produced in 1897..

467 Commercial fertilizer—Number of pounds used during 1897.....
Cost of for 1897.....
Pounds bought for crop of 1898.....
Cost of for 1898.....
Hay—Number of acres in grass (other than clover) in 1897...
Number of tons of hay produced in 1897.....
Clover—Number of acres grown in 1897.....
Number of tons of hay from clover in 1897.....
Number of bushels of seed in 1897.....
Number of acres plowed under for manure in 1897.....
Flax—Number of acres sown in 1897.....
Number of bushels of seed in 1897.....
Number of pounds of fiber obtained in 1897.....
Potatoes—Number of acres planted in 1897.....
Number of bushels produced in 1897.....
Number of acres for crop of 1898 (estimated).....
Tobacco—Number of acres planted in 1897.....
Number of pounds produced in 1897.....
Milk—Number of gallons sold for family use in 1897.....
Butter—Number of pounds made in home dairies in 1897...
Number of pounds made in factories and creameries in 1897.....
Cheese—Number of pounds made in home dairies in 1897...
Number of pounds made in factories and creameries in 1897.....
Sorghum—Number of acres planted in 1897.....
Number of pounds of sugar in 1897.....
Number of gallons of syrup in 1997.....
Maple sugar and syrup in 1898—Number of trees from which sugar was made during the season.....
Number of pounds of sugar.....
Number of gallons of syrup.....
Bees—Number of hives in 1897.....
Honey—Number of pounds produced in 1897.....
Eggs—Number of dozen produced in 1897.....
Number of dozen shipped to places beyond State in 1897.....
Grapes and wine—Number of acres planted in the year 1897.
468 Whole number of acres in vineyards to close of year 1897.....
Whole number of pounds of grapes gathered in the year 1897.....
Number of gallons of wine pressed in the year 1897...
Sweet potatoes—Number of acres planted in 1897.....
Number of bushels produced in 1897.....
Orchards—Number of acres occupied by orchards in 1897....
Number of bushels of apples produced in 1897.....
Number of bushels of peaches produced in 1897.....
Number of bushels of pears produced in 1897.....

Number of bushels of cherries produced in 1897.....
Number of bushels of plums produced in 1897.....

Lands owned in 1897, viz:
Number of acres of cultivated land.....
Number of acres of pasture land.....
Number of acres of wood land.....
Number of acres of other uncultivated land (lying waste).....

*Total number of acres owned in 1897.....

Horses—Number owned in 1897.....
Cattle—Beef cattle owned in 1897.....
Milch cows owned in 1897.....
All other cattle owned in 1897.....

Total number of cattle owned in 1897.....

Sheep—Number owned in 1897.....
Number killed by dogs in 1897.....
Value..... $
Number injured by dogs in 1897.....
Value..... $
Wool—Number of pounds shorn in 1897.....

Domestic animals died from diseases in 1897.

Hogs—Number.....
Value..... $
Sheep—Number.....
Value..... $
469 Cattle—Number.....
Value..... $
Horses—Number.....
Value..... $

Assessors must visit all creameries and cheese factories, and ascertain and report pounds of butter and cheese made in them. Also visit village and city milkmen, and ascertain and report amount of milk sold for family use. These are new and important items on the schedule.

*Cultivated, pasture, wood land, and other lands, must equal the total number of acreage.

The above form of statistics approved by me for the year 1898.

W. W. MILLER,
*Secretary of Agriculture.*

*Penalty for Refusing to Give Assessors True Statements of Statistics.*

"Any person, company or corporation, refusing to make out and deliver a statement of the facts, or any of them herein required, shall forfeit any pay to the State any sum not more than one hun-

dred dollars nor less than fifty dollars, to be recovered and paid as in the next preceding section provided as to penalty on an assessor." (Revised Statutes, vol. 1, sec. 1525.)

Assessors will call special attention to the foregoing law, and note the refusal or neglect of any person or persons to comply with its requirements.

*Official Penalties.*

"If an assessor neglects or refuses to make out and return statistics, as herein required, he shall forfeit and pay to the State any sum not more than one hundred dollars nor less than twenty dollars, to be recovered by action, which shall be brought by the prosecuting attorney on the request of the auditor of State; and the amount recovered, less the prosecuting attorney's fee of ten per centum, shall be paid into the State treasury to the credit of the school fund." (Revised Statutes, vol. 1, sec. 1524.)

Also, in relation to the statistics of births and deaths, the
470 county auditor "shall withhold his order until the law has been complied with, to the satisfaction of the probate judge." (See Revised Statutes, vol. 2, sec. 6396.)

County auditors must, in all cases, have this entire sheet of three pages printed, as per this copy, without any omission.

W. D. GUILBERT,
*Auditor of State.*

NOTE.—For other official penalties, see Revised Statutes, sections 140, 1050, 1250, etc.

1898. Personal property. Return of —— ——, ward —, township —, for the year 1898. Filed ——, 1898. —— ——, county auditor.

GUILBERT EXHIBIT "C."

Form 2—500.

*Tax Notice for Unincorporated Bank- and Bankers.*

To —— ——:

In pursuance of the provisions of sections 2758, 2759, 2759*a*, 2759*b*, 2760 and 2761 of the Revised Statutes, and in conformity to the decision of the supreme court of Ohio, in the case of The Treasurer of Fayette County *vs.* The People's and Drovers' Bank, rendered October 24th, 1890, you are required to make out and return to me, under oath, on or before the second Monday of May, 189–, a statement of your assets as a banker or bankers, for the year ending the first Monday of May, 189–, in the following form.

The court, in the case above cited, in substance, held that to arrive at the true valuation for taxation, that the following should be observed: From the aggregate sum of the 1st, 2d and 5th items enumerated, the auditor shall deduct the aggregate sum of the 5th, 6th and 7th items; this will give the banker credits for taxation.

From the 4th item deduct the 8th item; to this remainder add the 3d and 9th items to the credits above ascertained, and the said amount so ascertained shall be entered on the duplicate of the county, in the name of such bank or bankers for taxation.

Dated —— —, 189–.

——— ———,

*Auditor of —— County, Ohio.*

471 *Statement.*

1st. The average amount of all notes and bills receivable, discounted or purchased..... $

2d. The average amount of all accounts receivable.....

5th. The amount of real estate at its assessed value for taxation.

Total..... ..... $

5th. The amount of real estate at its assessed value for taxation.....

6th. The average amount of all deposits.....

7th. The average amount of accounts payable, exclusive of current deposit accounts.....

Total of debts to be deducted from the above credits.....

Balance of credits to be taxed.....

Printed on margin opposite items 1st to 7th, inclusive.

These averages are obtained by adding together the amounts of each item here specified, owned or standing on the bank books, on the first Monday of each month of the year ending on the first Monday of May in any year, and dividing the same by the number of months in the year. If business has been done for less than a year, the statement and division is made on the same principle for the number of months which have elapsed since its commencement, up to the first Monday of May, 189–.

4th. The average amount of all kinds of stocks, bonds (including United States Government bonds), or evidences of indebtedness, held as an investment, or in any way representing assets.....

8th. The average amount of United States Government and other securities that are exempt from taxation.....

Total, after deducting 8th from 4th item.....

472 3d. The average amount of cash and cash items in possession or transit.....

9th. The true value in money of all furniture and other property not otherwise herein enumerated.....

Total for taxation.....

1st. Amount of capital paid in or employed in said banking business..... $

2d. And the interest of each partner is as follows, to wit:

.....

.....

.....

THE STATE OF OHIO, }
—— *County*, } ss:

I, —— ——, do solemnly swear that I am the principal manager of the banking-house and business done at —— in said county, under the name of ——; that the several amounts of notes and bills and accounts receivable by said —— and of cash and cash items, bonds, stocks and other evidences of indebtedness, possessed or held by said —— —— during the year ending the first Monday of May, A. D. 1898, and the amount of capital paid in or employed in said banking business, and the interest of each partner, are fully and correctly stated in the above statement, and that all the items of the above statement are true and just as therein set forth.

—— ——.

Sworn to and subscribed before me, a — in and for said county, this — day of —— A. D. 189–.

(Official signature) —— ——.

Unincorporated banks and bankers. Return for taxation of —— ——. ——. Located at —— Ohio. Received at county auditor's office, —— —, 189–.

—— ——,
*County Auditor.*

UNITED STATES OF AMERICA, }
*Northern District of Ohio, Eastern Division.* }

I, Irvin Belford, special examiner to take testimony under the 67th rule as amended and under and by virtue of a decretal
473 order in the case of The Mercantile National Bank of Cleveland, Ohio, complainant, against R. S. Hubbard as treasurer of Cuyahoga county, Ohio, respondent, pending — the circuit court of the United States within and for the northern district of Ohio, made and entered on the 11th day of August, A. D. 1898, do hereby certify that the witness, W. D. Guilbert, whose deposition appears in the foregoing pages was by me duly sworn to testify the truth, the whole truth, and nothing but the truth. That said deposition was at the request of both parties, under my direction taken

down in shorthand by Clara K. Carey a skillful stenographer, approved by both parties, and by said stenographer thereafter put into typewriting. That said depositions were read over and examined by the solicitors interested therein, and now by agreement and stipulation of counsel for said parties the signature of said witness to his testimony was waived and it was further stipulated that said deposition- so far as competent, may be read in evidence the same as if they had been duly subscribed by said witnesses.

Said depositions were taken in pursuance of notices to the solicitors for the parties to said suit as to the first day therein stated, and thereafter by adjournment and agreement of parties on the several days therein named at the office of the auditor of State, Columbus, Ohio.

That the parties were represented at the taking of said depositions by their respective counsel as set forth.

That the documentary testimony and exhibits recited, were offered in evidence and marked as specially noted in the foregoing depositions; and that I am not counsel or relative of either party or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand this 14th day of February, anno Domini, 1899.

IRVIN BELFORD,
*Special Examiner.*

Circuit Court of the United States in and for the Northern District of Ohio, Eastern Division.

THE NATIONAL BANK OF COMMERCE OF CLEVELAND *et al.*, Plaintiffs,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Defendant.
No. —.

*Deposition of G. W. Taylor, Taken by W. W. Boynton.*

G. W. TAYLOR being first duly sworn according to law testified as follows:

474 Examined by Judge W. W. BOYNTON:

Q. Mr. Taylor, what relation do you sustain to the auditor of State's office?

A. Do clerical work; they call me railroad and bank clerk.

Q. And were you in June, 1897?

A. Yes, sir.

Q. You may state whether or not you are the G. W. Taylor that was elected clerk of the State board of equalization for bank shares in the year 1897?

A. Yes, sir, I am the party.

Q. Were you present at the meeting of the board convened on June 15, 1897?

A. Yes, sir.

Q. Did you make a record of the proceedings of the board?

A. Yes, sir, I did.

Q. By the record book kept by you, the following entry appears to have been made on June 15, 1897, namely, the State board for the equalization of the shares of incorporated banks met at the auditor of State's office June 15, being the third Tuesday in June. Present, his excellency Asa S. Bushnell, Hon. W. D. Guilbert, auditor of State, and Hon. F. S. Monnett, attorney general. The board organized by electing Asa S. Bushnell, president, G. W. Taylor, secretary. On motion of W. D. Guilbert, the board adjourned to meet at the call of the secretary. You may state whether or not that entry, as read, contains the action of the board on that day?

A. That was my understanding of it.

Q. Were you present when the motion was made?

A. I was.

Q. You may state whether Mr. Guilbert made the motion to adjourn, subject to a call by you.

A. That was my understanding of it and I so recorded it.

Q. By understanding you mean you so heard it?

A. Yes, sir.

Q. I further read: State board for equalization of bank shares met at office of auditor of State, in called session, September 7, 1897. Present, Honorable W. D. Guilbert, F. S. Monnett. D. A. Hollingsworth presented the case of the First National Bank of Cadiz as to the condition of assets of the bank, asking a material reduction. At the close of the entry of that day's proceedings, I find the words, "board adjourned." You may state whether that correctly represents the action taken by the board on that day?

475 A. Well, that was my own wording; that was about the substance of it.

Q. It was a final adjournment?

A. I didn't so understand it. They adjourned for various causes, time having expired, etc.

Q. That is you didn't understand the board had adjourned *sine die?*

A. No, sir.

Q. But they did not adjourn at that meeting, subject to the call of any one, as I understand it?

A. Well, I don't recall anything particular in that line excepting that they simply adjourned.

Q. You may state whether you ever called the board together yourself?

A. No, sir, I did not.

Q. I notice added to the first entry that I read to the words on motion of W. D. Guilbert, board adjourned to meet at the call of the secretary, the words, "amended to read, adjourned to meet at the call of the president of the board, Asa S. Bushnell, governor of the State." When was the language amended to read "adjourned to meet at the call of the president of the board, Asa S. Bushnell, governor of the State" put upon the record?

A. When it was put on the record? I can't tell the exact date.

Q. With reference to the last meeting?

A. It was the action of the last meeting of the board, but after that some time before it was put on record. I kept the minutes on a slip of paper, but what time they were committed to the book I don't remember.

Q. Do you mean to say that at the last meeting of the board for the year, 1897, you were directed to add to the various adjournments, the language amended to read, "adjourned to meet, etc."?

A. I can explain just what my recollection is as to that. Mr. Monnett, a member of the board, said the board had authority until its final adjournment to amend or correct any records that might appear on the book and in consideration of that they proceeded to amend these records.

Q. As appears from your amended record?

A. Yes, sir.

Q. Was any action taken with reference to the adjournment, subject to the call of the governor until the final meetings you speak of?

A. I don't recall about that, Judge.

Q. Does the record of your book of the various meetings of the board correctly represent what transpired at the meetings,
476 excepting the language "amended to read, etc.," except the amendment?

A. As nearly so as I could gather them.

Q. And the record was directed to be amended as it is amended at the last meeting of the board?

A. That is my recollection of it exactly, yes, sir.

Q. And up to that time the record correctly contained the action of the board?

(Question objected to by Attorney General Monnett.)

A. Yes, sir, as nearly as I could put it down, except adjournment was used in sense of recess, not being any final adjournment until last meeting.

Q. Was there any action taken by the board at its first meeting of June 15, directing the adjournment of the board to meet at the call of the governor?

(Question objected to by Attorney General Monnett.)

A. I think not; I don't remember that there was; only I was to notify board when all the reports were in from the banks, in that sense I was to call the board together; but the president made the official call and the meeting would be always held by his orders.

Q. Was there any action taken at the meeting of September 20, 1897, by the board relative to meeting thereafter at the call of the governor?

A. I don't remember that there was.

Q. Who introduced the subject at the last meeting of the board to make the record so that it would appear that the various meetings were to be at the call of somebody else beside yourself?

(Question objected to by Attorney General Monnett.)

A. I can't tell you that; I don't remember.

Q. Do you know how the matter came to be introduced for discussion?

A. No, I don't remember; I can't tell you distinctly about that now.

Cross-examination by Attorney General MONNETT:

Q. Mr. Taylor was there a motion made by anybody that you make the official calls of this board, or did you insert that, "subject to the call of the secretary," to accommodate your convenience as having charge of the record?

A. I can explain just how that occurred. At the first meeting Mr. Guilbert said by way of explanation of this motion, that the bank shares as they came into the office of the auditor were put into the hands of the secretary of the board, or bank clerk which position I occupied, and he would know when they were ready for a
477 meeting, when these returns were all in from the various counties, and he suggested that the secretary knowing this fact, would be a proper party to notify the board when it would be ready for another meeting.

Q. And therefore he made the motion to adjourn to the call of the secretary?

A. Well, that was my understanding.

Q. What you meant by a call was that you would simply notify the auditor that you had the subject-matter ready for a meeting and he would then proceed to issue a call, through the governor, was that all?

(Question objected to by Judge Boynton for the reason that it is an inference and argumentative.)

A. I simply understood, Mr. Guilbert explained in some detail or said that the secretary or bank clerk looked after that matter, made out statistics, prepared those things for the use of the board, and he would (*sic*) them when they would be ready for a meeting. It was my understanding that I was to notify the board when things were in shape.

Q. What is your experience, as clerk, about these reports under the statute coming in. Just state. Do they all get in by the 15th of June?

(Question objected to by Judge Boynton.)

A. There are 49 counties of the 88 in this morning, and there are more in this year than there were last at this time.

Q. So you would say by June 15th of last year there was not to exceed forty-nine counties, and the best of your recollection is that there were less?

A. I don't think there were nearly so many as that.

Q. And under the powers and duties of the board you say they cannot equalize bank shares when they have fifteen or twenty of

the eighty-eight counties in? Can they equalize before they are all in?

A. No, sir.

Q. Can you turn to the record and state when the different companies, the Mercantile national bank, the Cleveland national bank, the First national bank, the National City bank, the State national bank, the Park national bank, the Euclid Avenue national bank, the Western Reserve national bank, the Central national bank, the National Bank of Commerce, the Commercial national bank made their returns to the auditor of State?

A. We don't keep a record of that. The returns themselves are marked, or a part of them at least if not all are marked on the back of each return by the auditor of Cuyahoga county.

478 Q. They are marked received at this office July 19?

A. It would only be a matter of recollection with me when they came in.

Q. Can you get those original reports and also the day when they reached your office?

A. No, sir.

Q. Can you state whether under sec. 2808 R. S. at the first meeting of the board referred to in your testimony, or whether at any time in June of that year, the defendant banks above named made returns through the county auditor of Cuyahoga county, or in any other way of the value of the said shares as fixed by the county auditor of Cuyahoga county, or whether such auditor had made such report to the State auditor. Give us the facts on the matter of the reports of these different banks as fully as you can, taking them up in order.

A. There was no return made at all in the month of June by any of the defendant banks; no return to the State auditor's office through the auditor or in any other way.

Q. When was the first, to the best of your recollection refreshing your memory from the dates on the report, that they could possibly have been in *in* the auditor's office.

(Question objected to by counsel for plaintiff.)

A. The date appearing here is that at which the auditor of Cuyahoga county made the returns or equalized them, July 19, 1897. My personal recollection is that it was somewhere near the first of August when these returns reached the auditor's office.

Q. From auditor of Cuyahoga county?

A. Yes, sir.

Q. So that in the meeting of June 15th, or any meeting that was made by the board in June, the plaintiff banks reports were not before the board to act upon?

A. No, sir, they were not.

Q. Were there any other banks of the State that were to be equalized and to be compared with these, outstanding at that date or later?

(Question objected to by counsel for plaintiff.)

A. My impression is that more than one-half of the banks of the State were out on the third Tuesday of June. But there were some few other counties—I can only recall one now by name—that were later than this. I recall Erie county which did not come in until some time in August.

Q. Under sec. 2809 where said board is required to hear complaints and equalize the value of said shares, with the limita-
479 tion that said board shall not increase or reduce the grand aggregate value of said bank shares as returned by the several county auditors by more than 20 per cent. and the other provisions of that section, was there any way in which the board could comply with that statute prior to the plaintiff banks getting their reports in?

(Question objected to by counsel for plaintiff as being question of law.)

A. Have you any other means of getting the information than from getting these reports in through the various county auditors?

A. No, sir. My own opinion is that they couldn't be equalized until they get their bank returns, and had been received at their office.

Q. How many banks are there in the State for that board to consider and hear complaints about?

A. About 430.

Q. And you may state whether the same board, or any members of that board, have other duties during the months of June to December that occupies their time and prevents their giving their whole undivided attention to these four hundred banks?

(Question objected to by counsel for plaintiff.)

A. They have.

Q. Are they not members of many other boards?

A. Yes, sir.

Q. And have their respective duties as such officers of State?

(Question objected to by counsel for plaintiff.)

A. I might say that that was one of the features of the trouble; that it was impossible for us to get this board's attention because of their duties. They couldn't come just at the beck and call of this board, and the delay of the reports coming in was the great difficulty in making this equalization.

Q. Did any of the plaintiff banks file any complaints at any time under sec. 2809 with this board from June until December until they were certified back under the statute?

A. I don't remember about that. There were two banks I believe from Cleveland, but they were not defendant, the South Cleveland Banking Company and another minor bank, filed objections and asked for hearing.

Q. You may state whether an opportunity was given each and all of these banks to be still further heard before this board and they refused to come before the board, claiming we had adjourned *sine die*, through their counsel, when called upon by the auditor.

480 A. There was a delegation from these banks, five or six persons, and the board offered to hear their complaints and I believe a day was fixed if I remember right.

Q. And nobody came?

A. No, sir.

Q. And didn't they state they were going into court with it and stayed away?

A. That was my understanding, that they were all preparing and possibly had, to fight the case, or something to that effect.

Q. They refused to concede that the board had authority to hear their complaint after June 15, the day originally set for hearing? Wasn't that their statement?

(Question objected to by counsel for plaintiff.)

A. I heard that talked of, but I can't remember just how it was.

Q. Did the board not also tell them that under sec. 167 of the Revised Statutes which provides that the State auditor may remit taxes and penalties that he ascertains to have been erroneously or illegally assessed, and such penalties as have accrued or may accrue, in the consequence of the negligence or error of the officer of the board, provided when the amount to be remitted in any case shall exceed one hundred dollars, that he shall take to his assistance the governor and the attorney general, and that each and all of these plaintiffs banks refused, through this committee, to take advantage of the remedy herein provided?

A. Yes, sir, they were offered the opportunity at that meeting, and while they didn't absolutely refuse there, they did refuse by not availing themselves of the privilege of coming. They were notified they had the privilege; I remember that distinctly.

(Answer objected to by counsel for plaintiff.)

Q. Can you furnish to the stenographer, and make it a part of your testimony, or is it officially published the ratio of values on the plaintiff bank shares of stock as compared with other banks of the State?

A. The figures are all published; the rate is not. It could be furnished.

Q. You can furnish for the court, can you so far as the values relative to the State's grand duplicate is concerned, the plaintiff bank shares as compared with the shares of the other banks of the State?

A. Yes, sir, I can. Do you refer to the county auditor or the valuation that was finally fixed by the State board?

Q. By the State board. I wish you would furnish as a part
481 of your testimony and as Exhibit A on cross-examination, a tabulated statement of the values of all the banks in the State as found by this board at these various meetings and returned to the county auditor, and also the sworn values of these plaintiff banks as made to the comptroller at the same time, as near as you can and make it a part of your testimony.

A. Yes, sir, I can and will attach it to my testimony as a part of the same.

Q. Are you familiar as an attaché or officer of the auditor of State's office with the values of personal and real property in the State and moneyed capital in the hands of citizens of the State?

A. I am not sufficiently familiar to testify concerning those matters.

Q. Are you familiar as bank clerk of the auditor of State's office with the value placed upon bank shares of the private and national banks of Ohio for the year 1897?

A. Not of private banks.

Q. Are you of incorporated banks?

A. Yes, I have some familiarity with those banks.

Q. Have you been a banker yourself in Ohio?

A. Yes, sir.

Q. How many years?

A. Eight or nine.

Q. Prior to going into the auditor's office?

A. Yes, sir.

Q. How long have you been in the auditor's office?

A. Since January 1896.

Q. Were the values fixed by this board of plaintiff bank shares of stock greater than is assessed upon moneyed capital in the hands of citizens or individuals, or upon other bank shares of the State?

(Question objected to by counsel for plaintiff.)

A. I think not of the banks. As I said before, I am not so familiar with the values of other property.

Q. Was there any discrimination against the affairs of these national banking associations as against the other banks of the State?

(Question objected to by counsel for plaintiff.)

A. I think not.

Q. What is the fact as to the Cleveland valuation for the last two years, including this year being greater or less than other banks of the State?

(Question objected to by counsel for plaintiff.)

A. It was below the average.

Q. Below the average of other bank shares?

A. Yes sir, of incorporated bank shares.

482 Q. As a banker and citizen what do you know of the value of those bank shares in money, as to whether they have been assessed greater or less than the true value in money?

(Question objected to by counsel for plaintiff.)

A. By the returns made through the county auditor, as I said above, they were below the average of the banks in the aggregate.

Q. What deductions do they make to the county auditor as between what they return to the Comptroller of the Currency of the Federal Government and as to what they return to the county audi-

tor; what system of deduction do they adopt and what did they adopt in this case?

(Question objected to by counsel for plaintiff.)

A. I don't know that I could make a statement as to that. The deductions were quite large in many cases from their surplus and undivided profits as returned to the county auditor and as returned to the Comptroller of the Currency. I have the figures, or did have, in my drawer.

Q. That will appear in your tabulated statement that you will make?

A. I can make it so.

Mr. MONNETT: Please do so.

Q. How do they make the great difference in their sworn report to the Comptroller of the Currency and the report that is made to the county auditor of Cuyahoga county? Just explain to the court what deductions they make under the two classes of reports?

(Objected to by counsel for plaintiff as incompetent.)

A. I don't know that I understand you, Mr. Monnett, exactly.

Q. Let me make it plain. Do they make a greater or less return to the Federal Government from what they return to the State?

A. It is quite a great deal larger to the Comptroller of the Currency than to the county auditor.

Q. On substantially the same data?

A. Practically so.

Q. What system of deductions do they make when they return to the county auditor for deductions, to make that difference in value? Just state what item they deduct from any — their resources or what they had in their liabilities?

A. They deduct from their surplus and undivided profits, but as to the system they use, I only know of that as they undertook to explain it to the board when they were here last winter. There was a committee down here.

Q. Do you know any of the men that were here?

483 A. I can give you the names of some of them. Mr. Caldwell, of Commercial; Mr. Sullivan, of the Central; Bourne, of Union nat'l; Rittman, of Bank of Commerce.

Q. That committee called on the board in the fall or early winter of 1897, and demanded certain deductions be made, did they not, and explained how they were to be deducted and what those reductions were?

A. Their claim was an effort to substantiate their returns to the auditor of Cuyahoga county.

Q. How did they harmonize the matter of discrepancy between the report to the Federal and State? Just explain that to the court.

A. I don't know that I can. I believe Mr. Wilson said, in talking that over, that they took off a certain per cent.

Q. For what?

A. For what they considered poor paper and from real estate they took a certain amount.

Q. That is they took the entire capital stock, took an arbitrary per cent., five per cent., was it not, in some instances, as stated by Mr. Sullivan, and estimated that there was 5 per cent. of the entire capital stock represented in bad paper?

A. I don't remember whether it was Mr. Sullivan or Mr. Wilson. There was a statement like that made. They said in effect that they had a uniform understanding as to deduction that was in substance what they said, and they were all acting in concert in making this fight. That is the understanding they left with the board and myself.

(Answer objected to by counsel for plaintiff.)

Q. I wish you would explain, Mr. Taylor, to what they —

A. They were entitled to certain reductions on real estate.

Q. Explain that so the court will understand it.

A. Some one of them said, if I remember right, that there was much of the real estate not valued over 33 to 40 per cent., and that some held property that they considered too high and took off accordingly.

Q. There was a real-estate account of so much in these returns, giving amounts?

A. Yes, sir.

Q. That was on the tax duplicate in Cuyahoga county at a much less amount. To illustrate: The 40 per cent. of what they carried on their bank book, the difference between the 40 per cent. on the tax duplicate and 100 per cent. that they returned it at in their Federal report, they wanted that 60 per cent. deducted from their assets in addition to taking off the real estate?

484 A. I don't remember that they specified any particular per cent., but they wanted a large reduction because of that. I remember the auditor called attention to the law.

Q. In addition to that these banks insisted on deducting the difference of their book value of the real estate from their assets as listed, did they not?

(Question objected to by counsel for plaintiff.)

A. I don't know that they said book value. They had some rate by which they reduced that; I don't remember the amount. The talk was kind of general. The returns from some said 35 or 40; they had these marked down. I don't remember that they agreed on any certain per cent.

Q. When the board deducted from the returns of these banks from real estate, as it appears upon the tax duplicate, did they deduct from the bank real-estate account all that they carried it at on their books from real-estate account?

A. That is done by the auditor on the back of the report, that is the duplicate value is deducted in his return here and if he failed to do so and it was reported to this board, it was deducted.

Q. What did these plaintiff banks in their committee demand to have deducted in addition to the duplicate value?

(Question objected to by counsel for plaintiff.)

A. They claimed that they were carrying real estate that was not worth what they were carrying it at and they undertook to reduce the values themselves independent of this duplicate valuation.

Q. Do any of the other banks of the State in which this board equalizes under the statute, ask for that reduction or deduction?

(Question objected to by counsel for plaintiff.)

A. They haven't to the knowledge of the secretary.

Q. In making up the returns for equalization of bank shares is that deduction made for any of the other banks as required and requested by these banks?

(Question objected to by counsel for plaintiff.)

A. No, sir.

Q. Do any of the other banks of the State that are equalized with these banks, make horizontal deductions by a per cent. for bad paper, or are they required to specify what their bad paper consists of as a rule?

(Question objected to by counsel for plaintiff.)

A. We have no knowledge of anything of that sort at all. There has been no claims of that sort made by any other bank.

485 Q. Don't these plaintiff banks demand elements of reduction, such as you have named, that no other bank in the State demands?

(Question objected to by counsel for plaintiff.)

A. That is my understanding of it.

Q. Do you know anything about the valuation of the tax duplicate of Cuyahoga county as compared with the other eighty-eight counties where the other banks are situated? Whether it is higher or lower?

(Question objected to by counsel for plaintiff.)

A. I don't know as to other property.

Redirect examination by Judge BOYNTON:

Q. How early in 1897 were all the banks' returns made from the various county auditors of the State?

A. I couldn't answer as to time, Judge. It is only my personal recollection. I don't know but it was some time in August, if my recollection is right, that we telegraphed to Erie County people, but I couldn't give you date.

Q. Were they all in by the first of September?

A. Let me look at my record book here to refresh my memory before I answer that question, because from personal recollection I couldn't say. (Witness examines his record.) Well, I would suppose they were in by September. It is, however, more of a supposition than anything. They were slow about coming in.

Recross-examination by Mr. MONNETT:

Q. In the annual statement of the plaintiff, Commercial National Bank, it appears from the official files of the auditor of Cuyahoga county that its report was not filed in that county until June 15, 1897. Is that statement on the back the date when they were received by that auditor?

(Question objected to by counsel for plaintiff.)

A. It is not our stamp.

Q. These dates and stamp were on these papers when they were received at the auditor of State's office and it is right under "Received at county auditor's office, June 15, 1897"?

A. Yes, sir.

(Question objected to by counsel for plaintiff.)

Q. That same date of June 15, 1897, also appears on the returns of the annual statement to the auditor of Cuyahoga county of the Mercantile national bank, Cleveland national bank, Central
486 national bank, State national bank, and of the National Bank of Commerce, marked June 16, 1897?

(Question objected to by counsel for plaintiff.)

A. These dates were on the returns when they were received at the auditor of State's office at a later date than this.

Q. That is the condition they were received in your office?

A. Yes, sir.

Q. And they were not received in your office prior to the first of August to the best of your recollection?

—. Somewhere near that time.

Q. And when the board did pass upon these, waiving all question as to how the board was called together, the governor, auditor, attorney general, were they all present?

A. They were all present at that first meeting.

Q. These were all considered carefully, with testimony, before the value was fixed?

(Question objected to by counsel for plaintiff as leading.)

A. Yes, sir.

Q. The plaintiffs alleged in their petition that the owners of the share- of stock as set forth in their petitions, each have personal or individual indebtedness that is equal to, or greater, than their respective shares of stock and are praying to have their individual debts offset against their valuation. Do any of the stockholders in any other cities, or any other banks or national banks of this State adopt that rule to your knowledge?

(Question objected to by counsel for plaintiff.)

A. Not to my knowledge.

Q. Not considered as a credit by any taxing officer in the eighty-eight counties for the purpose of offsetting debt?

(Question objected to by counsel for plaintiff.)

A. Don't know of any. They are the sole exception so far as we know.

(*Question* objected to by counsel for plaintiff.)

487 *Report of the Condition of the Mercantile National Bank, at Cleveland, in the State of Ohio, at the Close of Business July 23, 1897.*

Resources.

| | | |
|---|---|---|
| Loans and discounts | | $2,257,680 24 |
| Overdrafts, secured and unsecured | | 4,369 93 |
| U. S. bonds to secure circulation | | 470,000 00 |
| Premiums on U. S. bonds | | 18,000 00 |
| Stocks, securities, etc | | 60,500 00 |
| Banking-house, furniture and fixtures | | 255,000 00 |
| Due from national banks not reserve agents | | 102,869 55 |
| Due from State banks and bankers | | 33,776 92 |
| Due from approved reserve agents | | 445,805 43 |
| Checks and other cash items | | 4,121 87 |
| Exchanges for clearing-house | | 10,069 34 |
| Notes of other national banks | | 53,947 00 |
| Fractional paper currency, nickels & cents | | 691 35 |
| Lawful money in bank, viz: | | |
| Specie | $312,400 00 | |
| Legal-tender notes | 50,000 00 | |
| | | 362,400 00 |
| Redemption fund with U. S. Treas. (5 per cent. of circulation) | | 21,150 00 |
| Total | | $4,100,381 63 |

Liabilities.

| | |
|---|---|
| Capital stock paid in | $1,000,000 00 |
| Surplus fund | 200,000 00 |
| Undivided profits, less expenses and taxes paid | 94,254 77 |
| National bank notes outstanding | 363,000 00 |
| Due to other national banks | 54,374 71 |
| Due to State banks and bankers | 6,970 14 |
| Individual deposits subject to check | 2,072,629 91 |
| Demand certificates of deposit | 7,420 72 |
| Cashier's checks outstanding | 1,731 38 |
| Liabilities other than those above stated, U. S. bond account | 300,000 00 |
| Total | $4,100,381 63 |

Exhibit "Table XI," "statement of the valuation of national banks as returned to and fixed by the State board of equalization of bank shares for 1897," has been incorporated in this Record in volume II, page 36*a*, and reference is hereby made thereto.

*Statement of Valuation of State Banks, as Returned to and Fixed by the State Board of Equalization of Bank Shares for 1897.*

| Name of bank. | City. | County. | Capital stock. | Surplus. | Undivided profits. | Total. | Value fixed by county auditor, exclusive of real estate. | Value fixed by State board, exclusive of real estate. | Assessed value of real estate. | Aggregate value fixed. |
|---|---|---|---|---|---|---|---|---|---|---|
| Farmers' | Manchester | Adams | $31,000 | $141 | $947 | $32,088 | $12,460 | $12,460 | $6,140 | $18,600 |
| Metropolitan | Lima | Allen | 27,000 | 14,000 | 1,049 | 42,049 | 25,452 | 25,452 | 2,580 | 28,032 |
| Commercial | Delphos | " | 50,000 | 10,500 | 4,333 | 64,833 | 41,998 | 41,998 | | 41,998 |
| Conneaut Mut. L'n. | Conneaut | Ashtabula | 80,000 | 7,000 | 2,851 | 89,851 | 42,963 | 11,963 | 46,887 | 58,850 |
| Ashtabula Co | Ashtabula | " | 50,000 | 7,471 | 4,952 | 62,423 | 56,572 | 34,772 | 5,851 | 40,623 |
| Orwell Co | Orwell | " | 25,000 | | 405 | 25,405 | 24,196 | 15,396 | 1,209 | 16,605 |
| Geneva Savings | Geneva | " | 25,000 | | 355 | 25,355 | 23,836 | 14,836 | 1,519 | 16,355 |
| Howe Co | Wapakoneta | Anglaize | 24,000 | 10,000 | 1,454 | 45,454 | 28,310 | 28,310 | | 28,310 |
| Dollar Savings | St. Clairsville | Belmont | 19,600 | | | 19,600 | 11,300 | 11,300 | | 11,300 |
| People's Savings | Martin's Ferry | " | 25,000 | 5,000 | 508 | 30,508 | 17,690 | 17,690 | 2,780 | 20,470 |
| Dollar Savings | Bridgeport | " | 50,000 | | 853 | 50,853 | 29,080 | 29,080 | 3,120 | 32,200 |
| Dollar Savings | Bellaire | " | 50,000 | 5,000 | 3,139 | 58,139 | 33,360 | 33,360 | 3,310 | 36,670 |
| Oglesby & Barnitz | Middletown | Butler | 50,000 | | 25,299 | 75,299 | 48,300 | 48,300 | 650 | 48,950 |
| Farmers' | Mechanicsburg | Champaign | 100,000 | 14,500 | 155 | 114,655 | 72,000 | 72,000 | 7,150 | 79,150 |
| J. P. Cummings | Carrollton | Carroll | 30,000 | 2,500 | 1,699 | 34,199 | 19,820 | 19,820 | 1,180 | 21,000 |
| H. A. Thompson | Salineville | Columbiana | 25,000 | 1,150 | 5,045 | 31,195 | 17,676 | 17,676 | 1,040 | 18,716 |
| 489 Commercial | Coshocton | Coshocton | 50,000 | 7,000 | 968 | 57,968 | 38,646 | 38,646 | | 38,646 |
| Br'dw'y Sav. & L'n | Cleveland | Cuyahoga | 300,000 | 90,000 | 9,198 | 399,198 | 212,630 | 212,630 | 36,220 | 248,850 |
| Clevel'd S. & B. Co. | " | " | 50,000 | | 1,011 | 51,011 | 24,780 | 29,780 | | 29,780 |
| Chagrin Falls | Chagrin Falls | " | 25,000 | 2,500 | 478 | 27,978 | 12,950 | 14,450 | 1,720 | 16,170 |
| Cleveland Trust Co. | Cleveland | " | 500,000 | 30,000 | 37,648 | 567,648 | 324,720 | 354,720 | | 354,720 |
| Cuyah'a B. & S. Co. | " | " | 50,000 | | 3,029 | 53,029 | 27,120 | 30,120 | | 30,120 |

*Table XII*—Continued.

| Name of bank. | City. | County. | Capital stock. | Surplus. | Undivided profits. | Total. | Value fixed by county auditor, exclusive of real estate. | Value fixed by State board, exclusive of real estate. | Assessed value of real estate. | Aggregate value fixed. |
|---|---|---|---|---|---|---|---|---|---|---|
| Col'mb'a S. & L. Co. | Cleveland..... | Cuyahoga.... | $50,000 | $4,000 | $6,323 | $60,323 | $31,500 | $34,500 | ..... | $34,500 |
| Detr't St. S. & L. Co. | " ..... | " .... | 50,000 | ..... | 4,878 | 54,878 | 28,380 | 31,380 | ..... | 31,380 |
| Dime S. & B. Co..... | " ..... | " .... | 300,000 | ..... | 678 | 300,678 | 172,730 | 211,730 | $1,660 | 213,390 |
| East End S. & B. Co. | " ..... | " .... | 200,000 | 15,000 | 11,408 | 226,408 | 113,820 | 151,820 | 8,010 | 159,830 |
| Euclid Ave.S.& B.Co. | " ..... | " .... | 200,000 | 3,000 | 6,845 | 209,845 | 114,540 | 121,040 | 1,000 | 122,040 |
| Forest City S.& B.Co. | " ..... | " .... | 50,000 | 2,000 | 25,000 | 77,000 | 37,630 | 52,630 | 3,990 | 56,620 |
| Garfield S. & B. Co.. | " ..... | " .... | 50,000 | ..... | 226 | 50,226 | 30,000 | 33,500 | ..... | 33,500 |
| Ger. Am. S. & B. Co. | " ..... | " ... | 50,000 | ..... | 2,246 | 52,246 | 27,470 | 29,970 | 1,080 | 31,050 |
| Guardian Trust Co.. | " ..... | " .... | 450,000 | ..... | ..... | 450,000 | 270,000 | 330,000 | ..... | 330,000 |
| Lake Shore B.& S.Co. | " ..... | " .... | 100,000 | 1,200 | 2,867 | 104,067 | 54,840 | 60,340 | ..... | 60,340 |
| Lorain St. Sav. Co... | " ..... | " .... | 50,000 | ..... | 12,562 | 62,562 | 33,720 | 48,220 | ..... | 48,220 |
| Marine Bank Co.... | " ..... | " .... | 200,000 | 11,000 | 589 | 211,589 | 118,530 | 122,330 | 3,950 | 126,280 |
| Mer. B. & Stor. Co.. | " ..... | " .... | 224,000 | ..... | ..... | 224,000 | 75,900 | 75,900 | 57,700 | 133,600 |
| Pearl St. S. & L. Co. | " ..... | " .... | 50,000 | 7,000 | 1,128 | 58,128 | 28,740 | 40,740 | 200 | 40,940 |
| Prod. Ex. Bkg. Co.. | " ..... | " .... | 100,000 | 15,000 | 4,703 | 119,703 | 52,740 | 59,240 | 11,500 | 70,740 |
| South Clev. B. Co... | " ..... | " .... | 150,000 | ..... | 28,010 | 178,010 | 83,380 | 83,380 | 11,830 | 95,210 |
| United B. & S. Co... | " ..... | " .... | 100,000 | ..... | ..... | 100,000 | 53,270 | 53,270 | 2,810 | 56,080 |
| Wade Park B. Co.... | " ..... | " .... | 100,000 | 9,000 | 6,369 | 115,369 | 51,240 | 51,240 | 14,300 | 65,540 |
| W. Cleveland B. Co. | " ..... | " .... | 38,892 | ..... | 687 | 39,579 | 15,550 | 22,550 | 5,090 | 27,640 |
| Wick B. & T. Co.... | " ..... | " .... | 250,000 | 2,000 | 2,010 | 254,010 | 147,600 | 152,400 | ..... | 152,400 |
| W'dl'd Av. S. & L. Co. | Cleveland..... | Cuyahoga.... | 250,000 | 57,500 | 11,039 | 318,539 | 176,100 | 176,100 | 11,670 | 187,770 |
| Farmer & Mt. B. Co. | Arcanum..... | Darke ..... | 24,000 | 4,500 | 1,401 | 29,901 | 20,000 | 20,000 | ..... | 20,000 |
| Greenville Bank Co. | Greenville..... | " ..... | 62,500 | 5,000 | 1,846 | 69,346 | 48,175 | 48,175 | ..... | 48,175 |
| Deposit " " | Delaware..... | Delaware.... | 50,000 | 10,097 | 8,077 | 68,274 | 43,520 | 43,520 | 6,480 | 50,000 |
| Delaware S'v'gs Co.. | " ..... | " .... | 25,000 | 6,000 | 3,164 | 34,164 | 24,140 | 24,140 | 1,360 | 25,500 |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Berlin Hts. Bk. Co. | Berlin Heights. | Erie | 50,000 | 2,000 | 5,990 | 57,990 | 34,434 | 34,434 | 360 | 34,794 |
| Erie Co. | Vermillion | " | 50,000 | 1,600 | 2,263 | 53,863 | 31,757 | 31,757 | 560 | 32,317 |
| Capitol City S'v'gs. | Columbus | Franklin | 60,000 | | 10,527 | 70,527 | 44,850 | 44,850 | | 44,850 |
| Citizens' " | " | " | 100,000 | 75,000 | 11,312 | 186,312 | 80,500 | 80,500 | 36,000 | 116,500 |
| Columbus S'v'gs. | " | " | 50,000 | 10,000 | 1,748 | 61,748 | 29,140 | 29,140 | 9,600 | 38,740 |
| 490 East End Savings | Columbus | Franklin | 25,000 | | 5,740 | 30,740 | 16,750 | 16,750 | 3,230 | 19,980 |
| Market Exchange | " | " | 25,000 | | 67 | 25,067 | 16,300 | 16,300 | | 16,300 |
| Ohio Savings | " | " | 25,000 | | 4,711 | 29,711 | 19,310 | 19,310 | 21 | 19,331 |
| State S. B. & T. Co. | " | " | 100,000 | | 47,757 | 147,757 | 90,480 | 90,480 | 3,120 | 93,600 |
| Westerville | Westerville | " | 30,000 | 900 | 865 | 31,765 | 18,740 | 18,740 | 800 | 19,540 |
| People's | Jamestown | Greene | 30,000 | | 111 | 30,111 | 19,540 | 19,540 | 860 | 20,400 |
| Osborn | Orborn | " | 18,000 | 2,050 | 5,844 | 25,894 | 19,800 | 16,800 | | 16,800 |
| Citizens' | Yellow Springs. | " | 20,000 | | 854 | 20,854 | 14,000 | 14,000 | 100 | 14,100 |
| City Hall | Cincinnati | Hamilton | 100,000 | 5,260 | 3,538 | 108,798 | 64,870 | 64,870 | | 64,870 |
| North Side | " | " | 25,000 | 755 | 1,537 | 27,292 | 15,820 | 15,820 | | 15,820 |
| Western German | " | " | 200,000 | 325,000 | 20,227 | 545,227 | 309,280 | 309,280 | 19,990 | 329,270 |
| Ada Savings | Ada | Hardin | 12,500 | 4,500 | | 17,000 | 10,200 | 10,200 | | 10,200 |
| Kenton Savings | Kenton | " | 100,000 | 20,000 | 1,953 | 121,953 | 73,172 | 73,172 | | 73,172 |
| Wright | Bellevue | Huron | 25,000 | 4,000 | 1,929 | 30,929 | 18,606 | 18,606 | | 18,606 |
| Greenwich | Greenwich | " | 25,000 | 7,500 | 1,354 | 33,854 | 15,936 | 15,936 | 4,590 | 20,526 |
| Huron Co. Bk. Co. | Norwalk | " | 43,000 | 15,000 | 4,266 | 62,266 | 33,204 | 33,204 | 4,400 | 37,604 |
| Norwalk Savings | " | " | 50,000 | 10,000 | 5,500 | 65,500 | 35,246 | 35,246 | 3,560 | 38,806 |
| Wakeman Bk. Co. | Wakeman | " | 25,000 | | 1,201 | 26,201 | 15,694 | 15,694 | 550 | 16,244 |
| Knox Co. Savings | Mt. Vernon | Knox | 25,000 | 5,000 | 2,110 | 32,110 | 17,568 | 17,568 | 2,830 | 20,398 |
| Dollar " | Painesville | Lake | 50,000 | 18,600 | 678 | 68,678 | 36,000 | 36,000 | 9,000 | 45,000 |
| 491 Exchange | Madison | Lake | 50,000 | | 1,942 | 51,942 | 30,000 | 30,000 | 2,770 | 32,770 |
| Farmers' Co. | West Liberty | Logan | 15,000 | 371 | 634 | 16,005 | 10,576 | 10,576 | | 10,576 |
| Lorain Co. | Elyria | Lorain | 50,000 | 3,000 | 443 | 53,443 | 32,210 | 32,210 | | 32,210 |
| Savings Deposit | " | " | 200,000 | 20,000 | 3,376 | 223,376 | 127,853 | 127,853 | 6,027 | 133,880 |
| Citizens' Savings | Lorain | " | 50,000 | 17,000 | 2,712 | 69,712 | 36,120 | 36,120 | 3,140 | 39,260 |
| Lorain " | " | " | 50,000 | 7,000 | 1,951 | 58,951 | 31,700 | 31,700 | 2,300 | 34,000 |
| Penfield Av. S'v'gs. | " | " | 25,000 | | 1,748 | 26,748 | 12,564 | 12,564 | 2,660 | 15,224 |
| Oberlin Co. | Oberlin | " | 25,000 | 5,000 | 1,427 | 31,427 | 15,600 | 15,600 | | 15,600 |
| Home Savings | Wellington | " | 25,000 | 429 | 2,908 | 28,337 | 14,620 | 14,620 | 1,450 | 16,070 |
| East Side | Toledo | Lucas | 30,000 | | 10,829 | 40,829 | 23,650 | 23,650 | 1,680 | 25,330 |
| Home Savings | Toledo | Lucas | 250,000 | | 39,509 | 289,509 | 172,993 | 172,993 | | 172,993 |
| M'ch'ts' & Clerks' | " | " | 150,000 | 80,000 | 5,376 | 235,376 | 127,157 | 127,157 | 15,240 | 142,397 |
| Ohio S. & T. Co. | " | " | 150,000 | | 2,575 | 152,575 | 89,500 | 89,500 | | 89,500 |

2003

*Table XII*—Continued.

| Name of bank. | City. | County. | Capital stock. | Surplus. | Undivided profits. | Total. | Value fixed by county auditor, exclusive of real estate. | Value fixed by State board, exclusive of real estate. | Assessed value of real estate. | Aggregate value fixed. |
|---|---|---|---|---|---|---|---|---|---|---|
| Toledo S. & T. Co | Toledo | Lucas | $100,000 | $175,000 | $12,040 | $287,040 | $148,534 | $148,534 | $23,690 | $172,224 |
| Union S. & T. Co | " | " | 250,000 | ..... | 21,227 | 271,227 | 148,526 | 148,526 | 14,210 | 162,736 |
| Dollar S. & T. Co | Youngstown | Mahoning | 300,000 | ..... | ..... | 300,000 | 172,910 | 172,910 | 7,000 | 180,000 |
| Farmers' D. & S. | Poland | " | 100,000 | ..... | 4,540 | 104,540 | 61,980 | 61,980 | 740 | 62,720 |
| Fahey Banking Co. | Marion | Marion | 245,300 | ..... | 3,091 | 248,391 | 159,445 | 159,445 | ..... | 159,445 |
| Farmers' & Mech | " | " | 200,000 | 12,000 | 5,740 | 217,740 | 120,250 | 120,250 | 15,000 | 135,250 |
| Marion County Co. | " | " | 236,100 | 7,791 | 1,134 | 245,025 | 151,125 | 151,125 | 3,600 | 154,725 |
| Savings Deposit | Medina | Medina | 25,000 | 1,650 | 1,960 | 28,610 | 17,000 | 17,000 | 3,000 | 20,000 |
| Ohio S. D. & T. Co. | Dayton | Montgomery | 50,000 | 627 | 1,449 | 52,076 | 36,452 | 36,452 | ..... | 36,452 |
| Citizens' | McConnelsville | Morgan | 140,000 | 4,700 | 224 | 144,924 | 71,060 | 67,560 | 26,940 | 94,500 |
| " | Celina | Mercer | 42,500 | 196 | ..... | 42,696 | 21,330 | 21,330 | 3,670 | 25,000 |
| Monroe | Woodsfield | Monroe | 50,000 | ..... | 2,716 | 52,716 | 18,770 | 18,770 | 6,230 | 25,000 |
| Citizens' | Cardington | Morrow | 25,000 | 1,200 | 1,205 | 27,405 | 17,445 | 17,445 | 1,305 | 18,750 |
| Ohio S. D. & T. Co. | Zanesville | Muskingum | 17,000 | 742 | 1,803 | 19,545 | 6,572 | 6,572 | 4,340 | 10,912 |
| People's Savings | " | " | 50,000 | 12,500 | ..... | 62,500 | 35,928 | 35,928 | ..... | 35,928 |
| Oak Harbor State | Oak Harbor | Ottawa | 25,000 | 4,061 | 2,311 | 31,372 | 17,900 | 17,900 | 200 | 18,100 |
| German-American | Port Clinton | " | 25,000 | 1,540 | 3,705 | 30,245 | 15,590 | 15,590 | 1,330 | 16,920 |
| Farmers' | Paulding | Paulding | 18,750 | ..... | 1,946 | 20,696 | 10,250 | 10,250 | 1,000 | 11,250 |
| Paulding Deposit | " | " | 25,000 | ..... | 2,120 | 27,120 | 13,600 | 13,600 | 1,400 | 15,000 |
| Perry Co. C | New Lex'gton | Perry | 50,000 | 10,000 | 3,347 | 63,347 | 34,800 | 34,800 | 2,520 | 37,320 |
| Somerset | Somerset | " | 15,000 | 1,417 | 10,531 | 26,948 | 16,660 | 16,660 | ..... | 16,660 |
| Union Co. | New Holland | Pickaway | 25,000 | 300 | 209 | 25,509 | 15,300 | 15,300 | ..... | 15,300 |
| Mansfield | Mansfield | Richland | 100,000 | 28,500 | 5,024 | 133,524 | 91,350 | 85,850 | 2,120 | 87,970 |
| Savings | Mansfield | Richland | 100,000 | 20,000 | 543 | 120,543 | 75,320 | 72,820 | 9,060 | 81,880 |
| Citizens' | Shelby | " | 60,000 | 2,500 | 4,267 | 66,767 | 45,410 | 41,410 | 1,330 | 42,740 |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| Savings | Chillicothe | Ross | 25,000 | | 24,910 | 49,910 | 27,136 | 27,136 | 2,810 | 29,946 |
| Scioto Valley | Kingston | " | 30,000 | 9,000 | 847 | 39,847 | 23,228 | 23,228 | 680 | 23,908 |
| Crogan Bk. & Svg. Co. | Fremont | Sandusky | 25,000 | 3,500 | 1,965 | 30,465 | 16,200 | 16,200 | 2,080 | 18,280 |
| Fremont Savings | " | " | 50,000 | 11,000 | 4,175 | 65,175 | 37,210 | 37,210 | 1,890 | 39,100 |
| Gibsonburg Bk. Co. | Gibsonburg | " | 20,000 | | 5,435 | 25,435 | 13,470 | 13,470 | 1,790 | 15,260 |
| People's | Clyde | " | 25,000 | 3,000 | 798 | 28,798 | 16,600 | 16,600 | 680 | 17,280 |
| Central Savings | Portsmouth | Scioto | 30,200 | 3,000 | 2,832 | 36,032 | 22,300 | 22,300 | | 22,300 |
| Mechanics' Savings | Fostoria | Seneca | 25,000 | | 1,584 | 26,584 | 16,400 | 16,400 | | 16,400 |
| Commercial | Tiffin | " | 100,000 | 20,000 | 20,609 | 140,609 | 79,970 | 79,970 | 11,430 | 91,400 |
| Tiffin Savings | " | " | 50,000 | 2,850 | 2,926 | 55,776 | 31,880 | 31,880 | 3,850 | 35,730 |
| Alliance | Alliance | Stark | 70,000 | 7,000 | 10,219 | 87,219 | 41,980 | 41,980 | 14,710 | 56,690 |
| City Savings | " | " | 50,000 | 8,000 | 1,652 | 59,652 | 31,830 | 31,830 | 6,940 | 38,770 |
| Central Savings | Canton | " | 100,000 | | 39,158 | 139,158 | 69,800 | 69,800 | 20,650 | 90,450 |
| Dime " | " | " | 50,000 | 900 | 1,106 | 52,006 | 34,800 | 33,800 | | 33,800 |
| Farmers' | " | " | 50,000 | | 5,395 | 55,395 | 30,140 | 30,140 | 5,870 | 36,010 |
| Geo. D. Harter | " | " | 180,000 | 47,200 | 15,042 | 242,242 | 144,090 | 144,090 | 13,370 | 157,460 |
| People's Savings | " | " | 50,000 | 12,000 | | 62,000 | 38,240 | 38,240 | 2,060 | 40,300 |
| Masillon Savings | Massillon | " | 49,500 | | 3,165 | 52,665 | 34,230 | 34,230 | | 34,230 |
| 493 Minerva | Minerva | Stark | 17,400 | 1,740 | 707 | 19,847 | 8,140 | 8,140 | 4,760 | 12,900 |
| Akron Savings | Akron | Summit | 200,000 | | | 200,000 | 87,300 | 85,300 | 44,700 | 130,000 |
| People's " | " | " | 50,000 | 15,000 | 5,683 | 70,683 | 46,650 | 44,650 | | 44,650 |
| Barberton | Barberton | " | 50,000 | 2,825 | 2,003 | 54,828 | 36,180 | 36,180 | | 36,180 |
| Hubbard | Hubbard | Trumbull | 50,000 | 5,641 | 7,239 | 62,880 | 40,245 | 40,245 | 630 | 40,875 |
| Kinsman | Kinsman | " | 12,500 | | 6,513 | 19,013 | 13,360 | 13,360 | | 13,360 |
| Warren Savings | Warren | " | 100,000 | | 19,754 | 119,754 | 77,840 | 77,840 | | 77,840 |
| Farmers' | Marysville | Union | 30,000 | 2,200 | 659 | 32,859 | 18,088 | 18,088 | 2,770 | 20,858 |
| Marysville | " | " | 60,000 | 10,000 | 1,223 | 71,223 | 41,142 | 41,142 | 6,080 | 47,222 |
| Union | " | " | 36,000 | 4,000 | 954 | 40,954 | 26,554 | 26,554 | | 26,554 |
| Montpelier Banking & S. S. Co | Montpelier | Williams | 25,000 | | 2,643 | 27,643 | 13,215 | 13,215 | 3,370 | 16,585 |
| Commercial | Bowling Green | Wood | 75,000 | 4,000 | 1,097 | 80,097 | 46,010 | 46,010 | 1,990 | 48,000 |
| Hardy | N'th Baltimore | " | 50,000 | | 4,107 | 54,107 | 32,465 | 32,465 | | 32,465 |
| Citizens' | Perrysburg | " | 25,750 | 342 | | 26,092 | 15,180 | 15,180 | 470 | 15,650 |
| " | Weston | " | 30,000 | 700 | 1,145 | 31,845 | 19,107 | 19,107 | | 19,107 |
| Total | | | $11,220,492 | $1,457,046 | $751,621 | $13,429,159 | $7,558,601 | $7,729,601 | $681,179 | $8,410,780 |

494 Endorsements on part fourth.

Part fourth. Mercantile National Bank, *et al.*, *vs.* R. S. Hubbard, treasurer. Filed Feb. 15, 1899. Irvin Belford, clerk U. S. circuit court, N. D. O.

*Exceptions by Plaintiff to Master's Report, etc.*

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Complainant,
*vs.*
R. S. HUBBARD, Treasurer of Cuyahoga County, Ohio.

Exceptions by plaintiff to master's report and motion for judgment.

Now comes the complainant and excepts to the report made herein by Irvin Belford, special master of this court, to whom this cause was referred by an order of the court made and entered on the 6th day of Sept., 1898, in the following particulars:

First exception. For that the said master in his said report found that there was not sufficient evidence to show what portion of credits consists of moneyed capital in the hands of individuals which in fact enters into competition with business with the national banks, and that there was no evidence as to what the total moneyed capital in the hands of individual citizens, and included in the term credits, amounts to; and that he was, therefore, unable to report whether there has or has not been any material discrimination such as the Federal statute was enacted to prevent, against said complainant and in favor of other moneyed capital in the State outside of Cuyahoga county, because complainant says that the evidence found on pages 30 and 31 of the Record of the evidence filed in said case by said master, shows that the value of all credits after deducting all *bona fide* debts for the year 1897 in the State, *were* $99,227,416. That all moneys invested in bonds, stocks, joint stock companies, annuities or otherwise, in the State for that year only amounted to $7,611,124. And the testimony further shows, at page 45 of the Record, that the individual deposits in banks of the State for the year 1897
495 amounted to $50,422,444.55, all of which were debts due from banks which the statute authorizes to be taken from credits.

The testimony further shows, page 131, of the record, that the obligations due national banks of Ohio for the year 1897, were $118,820,000, and loans and discounts of State banks amounted to over $110,000,000, all of which were evidenced by obligations which the statute authorizes to be deducted from credits in fixing their value for taxation. It further appears from the evidence, page 43 of the record, that building and loan associations for the year 1897 loaned out for interest, money to an amount exceeding $60,000,000, and that the capital so invested was in direct competition with that invested in national bank shares; that the shares of building and loan associations to the extent money is loaned upon them, are exempt from taxation while all other shares are taxed as credits.

It further appears from former adjudications in this court in case of the plaintiff against the predecessor of the defendant, that credits

from which debts may be deducted under the laws of Ohio in determining the valuation of the former for taxation, are sufficient in amount and in character to create a discrimination against capital invested in national bank shares forbidden by the act of Congress defining the conditions on which national bank shares may be taxed and for which no provision is made by the laws of Ohio relating to the valuation of national bank shares.

It further appears, inferentially from the evidence, on page 42 of the record of the evidence, that there was in 1897 more than $200,000,000 of moneyed capital in the hands of individual citizens of the State invested in interest-bearing promissory notes made and owned in the State of Ohio secured by mortgage, which money so invested comes directly in competition with capital invested in national bank shares.

*Exceptions to Conclusions of Law.*

The complainant excepts to the conclusions of law of the master relating to the former adjudication. First, that the question of the right to deduction of debts from the value of national bank shares was not a fact or right directly involved in said adjudication and that such fact was not decided and carried into such former judgment. On the contrary thereof such fact and right were directly involved in the issue and directly decided in such former adjudications. Second, that said shareholders are not entitled to said
496 deductions asked for in the bill of complaint; on the contrary thereof from the finding of facts as made by the master as well as from the evidence referred to in the above exceptions to the findings of fact such shareholders are entitled to said deductions.

The complainant moves for judgment and decree on the findings of the master in its favor and on the finding of facts relating to the former adjudication of the question in issue, and on the findings of the master and the evidence as to all other issues.

W. W. BOYNTON &
N. T. HORR,
*Solicitors for Complainant.*

Endorsements on exceptions of plaintiff.

5714. The Mercantile Nat'l Bank of Cleveland, *vs.* R. S. Hubbard, treas. of Cuyahoga county, Ohio. Exceptions by compl't to master's report and motion for judgment. Filed Nov. 13, 1899. Irvin Belford, clerk U. S. circuit court, N. D. O. W. W. Boynton & N. T. Horr, sol's for compl't.

*Stipulation as to Trial of Cases.*

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF Cleveland, Ohio, Complainant,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Respondent.
} Stipulation. No. 5714.

The complainant, The Mercantile National Bank of Cleveland, Ohio; The Cleveland National Bank; The Central National Bank; The Commercial National Bank; The Euclid Avenue National Bank; The First National Bank; The National Bank of Commerce; The National City Bank; The Park National Bank of Cleveland; The State National Bank; The Union National Bank, and The Western Reserve National Bank, all complainants in certain actions now pending in said court, involving the same questions regarding the validity of the taxing of the bank shares of each of said complainant banks for the year 1897, here stipulate and agree, by themselves and their counsel, with said defendant and his counsel,
497 that the questions involved in said actions may be litigated and determined in the action of The Mercantile National Bank of Cleveland, Ohio, and the remaining actions, above named, shall not be further prosecuted but the same shall abide the judgment, similar judgments to be entered therein, that may be finally rendered in the above case of the Mercantile National Bank.

It is further agreed that this stipulation, be, by the court entered upon the journal thereof, as by agreement.

Dated, October 27th, 1899.

W. W. BOYNTON &
N. T. HORR,
*Attorneys for All Defendants, Except Euclid Ave., Central and Western Reserve Banks and State.*
WEBSTER & COOK,
*Att'ys for Euclid Avenue National, State National, and Central National Banks.*
HOYT, DUSTIN & KELLEY,
*For Western Reserve,*
*Attorneys for Complainants.*

F. S. MONNETT,
*Att'y General,*
SMITH W. BENNETT,
P. H. KAISER,
*County Solicitor,*
F. L. TAFT,
*Ass't Solicitor,*
*Attorneys for Respondent in Each of said Cases.*

Endorsements on stipulation.

U. S. circuit court. No. 5714. The Mercantile Nat'l Bank *vs.* R. S. Hubbard, as treasurer, etc. Stipulation. Filed Nov. 27, 1899. Irvin Belford, clerk U. S. circuit court, N. D. O.

*Exceptions by Respondent to Special Master's Report.*

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, Complainant, *vs.* R. S. HUBBARD, Treasurer of Cuyahoga County, Ohio, Respondent. } No. 5714.

Exceptions by respondent to special master's report.

Comes now the respondent, —— —— treasurer of Cuyahoga
498 county, Ohio, being within one month from the filing of the report of the special master herein, and excepts to the finding of facts and conclusions of law filed herein by Irvin Belford, Esq., special master herein, in the following particulars, to wit:

1. Said respondent excepts to the refusal of the said special master to exclude as evidence herein, and further excepts to the said special master including as evidence herein and incorporating in his report filed herein that portion of the 17th finding which is in the words and figures following, to wit:

"As a result of my examination of such report, I find that the capital stock of building and loan associations paid in, in 1896, amounted to $80,175,163.71, and that the total number of shares in force at the close of 1896 was 1,389,059, and that the total number of shares upon which loans had been made was 410,176. No doubt large amounts of money were loaned in this year by building and loan associations to non-stockholders in such a manner as to bring it within competition with national banks and which would properly be called credits. I further find that the value of credits, after deducting *bona fide* debts amounted to $99,227,416.00. That moneys invested in bonds, stocks, joint-stock companies and annuities or otherwise, *was* $7,611,124."

"And that the valuation of State banks as fixed by the State board of equalization was $8,410,780.00. I also find that in Ohio, in 1890, there were real-estate mortgage debts, in force, amounting to $259,842,188.00."

"An examination of the valuation of shares of bank as returned to, and fixed, by the State board of equalization of bank shares, for 1897, discloses the fact that the assessed valuation of shares of all incorporated banks in the State of Ohio, in the year 1897, exclusive of real estate, as fixed by the State board of equalization, was 61⅔ per cent. of the aggregate capital stock surplus and undivided profits of such incorporated banks."

"That the assessed valuation of all national bank shares in Ohio, in 1897, exclusive of real estate as fixed by the county auditors of the State, was $58\frac{5}{10}$ per cent. of the aggregate capital stock, surplus and undivided profits as reported to said auditor, which said valuation was increased by the State board of equalization to about $59\frac{5}{10}$ per cent. of the said aggregate value of said capital stock, surplus and undivided profits, an increase of $1\frac{6}{10}$ per cent. on the valuation fixed by the auditors."

"That the assessed valuation of national bank shares in the State of Ohio for the year 1897, outside of Cuyahoga county ex-
499 clusive of real estate, as fixed by the county auditors of the State, was $58\frac{9}{10}$ per cent. of the aggregate capital stock, surplus and undivided profits as reported to such county auditors which said valuation was decreased by the State board of equalization to $57\frac{7}{10}$ per cent. of said aggregate value of said capital stock, surplus and undivided profits, being a decrease of a little more than 2 per cent."

As grounds of such exceptions, said respondent says:

*a.* "That if the court holds it competent to put in proof -tered into in writing, and as found by the special master in the eighteenth finding of facts, incorporated in his said report, the said parties stipulated and agreed:

"That if the court holds it competent to put in proof of taxation of moneyed capital and bank shares, outside of Cuyahoga county, that there is no discrimination for counties outside of the county of Cuyahoga, in the State of Ohio, by the taxing officers of said county in fixing the valuation for the purposes of taxation upon moneyed capital as against shares in incorporated banks."

*b.* That thereby the parties hereto agreed as an admitted fact in said cause, that at the time in question, and then being considered by said special master, there was and is no discrimination as provided against in section 5219 of the Revised Statutes of the United States, against shares of incorporated banks in favor of other moneyed capital in the hands of individual citizens of the State of Ohio, in all the counties of said State, outside of the said county of Cuyahoga.

*c.* That as an admitted fact in said cause the taxation of shares of national banking associations, outside of said county of Cuyahoga was not and is not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State of Ohio, outside of the county of Cuyahoga.

*d.* That said stipulation and agreement, so made by said parties, was and is binding and conclusive upon said parties and their counsel, for thereby the respondent was excluded from taking any further testimony to disprove the allegations contained in paragraphs 5, 6 and 8 of complainant's bill of complaint upon the issue of the alleged discrimination against the national bank shares in the State of Ohio outside of Cuyahoga county. That by virtue of said stipulation and agreement the issue of such alleged discrimination against national banks shares was limited to the said county of Cuyahoga, and that the evidential facts above set forth were offered

in opposition to the stipulation and agreement aforesaid and should not have been received by said special master, and should not have been incorporated in his said report.

500 Wherefore respondent says that the admission of the testimony aforesaid was erroneous and plainly prejudicial to the respondent and should be stricken from the finding of facts and report of the special master.

2. Said respondent excepts to that portion of the finding of facts, in paragraph 17 thereof, as is in the words and figures following, to wit:

"And I also find that the valuation placed upon the shares of complainant bank by the State board of equalization was much higher than that fixed on other moneyed capital in the hands of individual citizens and corporations in the county of Cuyahoga and city of Cleveland, and that such action of the board of equalization was an unjust discrimination against said complainant."

And as ground of such exception said respondent says:

That such finding is not justified by the evidence and is against the evidence taken in said cause and incorporated in said report of said special master. For that in paragraph 17 of said report said special master has found that moneyed capital in the hands of individual citizens in Cuyahoga county was assessed for taxation in the year 1897 as nearly as practicable at 60 per cent. of its value. And he has further found, in paragraph 19 of his said report that the actual cash value of the shares of stock in complainant's bank was $128.00 per share; and the master having found, in paragraph 3, of his said report that the capital stock of said complainant's bank was divided into 10,000 shares, the actual cash value thereof, as found by said special master was $1,280,000.00. That pursuant to section 2766 Revised Statutes of Ohio there should be deducted from the true value of said shares the value of the real estate as the same stands on the duplicate, which the master finds in the 5th paragraph of said report to amount to $117,370.00, which being deducted from the actual cash value of said shares leaves $1,162,630.00 as the true value, after deducting the value of the real estate. That computing 60 per cent. upon said amount it would fix the value upon which taxes should have been computed at $697,578.00, while the said board of equalization fixed the value of said shares, for taxable purposes, at only $642,320.00. That thereby the amount of the taxable value of complainant's shares, as compared with their actual value, was but slightly in excess of 55 per cent., and therefore no discrimination against complainant's shares was caused by the action of said board and none existed in favor of any other moneyed capital in Cuyahoga county, Ohio.

As evidence supporting the valuation as fixed by said
501 board to said bank shares, and far in excess thereof, the special master finds that at the time the cashier of said bank made the report of the resources and liabilities of said complainant bank to the county auditor, and for six months prior and six months subsequent thereto, said complainant bank sustained no losses; and during all said time made net earnings sufficient out of which to pay

a dividend semi-annually of 3 per cent. on all of its said shares, and carried forward at each of said semi-annual periods, to the credit of said shares, net profits varying in amount from $84,000 to $94,000.

3. Said respondent excepts to the refusal of the special master to find the finding of fact requested by respondent which finding of fact, as requested, is as follows:

"That the true value in money of said 10,000 shares of capital stock in said complainant bank, was, on the day preceding the second Monday in April, 1897, $1,280,000.00 from which should be deducted the value of the real estate belonging to said bank, as the same appears upon the duplicate, amounting to $117,370.00, leaving a balance of $1,162,630.00. That adopting the practice of the assessing officers for said county of Cuyahoga, during the year 1897, of assessing other moneyed capital in the hands of individual citizens of said city and county, at 60 per cent. of the true value thereof in money, the taxable value of said shares in the aggregate was $697,576.00. That said State board for the equalization of the shares of incorporated banks having fixed the valuation thereof at $642,320.00; said master finds that there was no unlawful or unjust discrimination against the shares of complainant bank, in favor of any other moneyed capital in said county of Cuyahoga, or elsewhere."

*Exceptions to Conclusions of Law.*

1. The respondent excepts to the conclusion of law of the special master as set forth in the third paragraph of his report and conclusions of law, and excepts to his conclusions that the plea contained in the amendment to the answer does not constitute a defense to the matters contained in the bill.

2. The respondent excepts to the conclusion of law of the special master as set forth in paragraph four of his report of his conclusions of law, and excepts to his conclusion that the board of equalization of the shares of incorporated banks, did not have jurisdiction
502 to increase the valuation of the shares of the complainant bank as fixed by the auditor of Cuyahoga county. And further excepts to the conclusion of the master finding for the complainant on said issue.

Wherefore the respondent prays the judgment of the court to correct the finding of fact of the special master in the particulars as herein set forth, and prays the judgment of the court in the vacating of the findings in those respects; and upon the report of the master as so amended in the finding of facts and conclusions of law as herein requested, the respondent prays for judgment and decree in his favor.

P. H. KAISER,
*County Solicitor,*
F. L. TAFT,
*Ass't County Solicitor,*
T. H. HOGSETT,
*Director of Law of City of Cleveland,*
*Counsel for Respondent.*

F. S. MONNETT,
*Att'y General,*
SMITH W. BENNETT, *Of Counsel.*

Endorsements on exceptions by respondents.

5714. In the circuit court of the U. S. northern district of Ohio, *eastern division. The Mercantile National Bank of Cleveland, Ohio*, complainant, *vs.* R. S. Hubbard, treasurer Cuyahoga county, O., respondent. Exception by respondent to special master's report. Filed Nov. 28, 1899. Irvin Belford, clerk U. S. circuit court, N. D. O.

*Motion for Order Directing Master to File Testimony.*

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Plaintiff, *vs.* R. S. HUBBARD, as Treasurer of Cuyahoga County, Defendant. } Motion.

Now comes the plaintiff and moves the court for an order directing the master heretofore appointed in said case to report the
503 testimony taken therein, and that such order have the force and effect of an order made at the time said master was appointed to hear the testimony and report his conclusions of fact and law therein.

The plaintiff also moves the court for permission to amend its exceptions to the master's report by embodying therein an exception to the failure of the master to make a finding of the adjudications made in said cause by this court following the adjudication of 1887, and to his failure to find as a conclusion of law that such subsequent adjudications are a bar to the present action.

W. W. BOYNTON AND
N. T. HORR,
*Sol'rs for Pl'ff.*

Counsel for respondent hereby waive notice of the above motion this 16 day of December, 1899.

P. H. KAISER,
*Def't's Att'y.*

Endorsements on motion.

5714. U. S. circuit court, northern district of Ohio, eastern division. The Mercantile Nat'l Bank of Cleveland, plaintiff, *vs.* R. S. Hubbard, as treas. of Cuyahoga county, defendant. Motion. File W. H. T. Filed Dec. 16, 1899, Irvin Belford, clerk, U. S. circuit court, N. D. O.

*Order to File Testimony and Leave to Compl't to Amend Exceptions.*

October Term, A. D. 1899, to wit, December 16th, A. D. 1899.

Present: The Honorable Wm. H. Taft, U. S. circuit judge.

THE MERCANTILE NATIONAL BANK OF CLEVELAND
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County. } 5714. Chancery.

On motion of complainant it is ordered that the master heretofore appointed in said case do report the testimony taken on which his said report was made, and that this order take effect as of the date of the order appointing said master. And the action of master in heretofore filing said evidence is hereby affirmed.

504 It is further ordered that leave be granted to complainant to amend its exceptions to the report of the master heretofore filed in said cause for failure to report upon the facts as to the former adjudications mentioned in the *the* bill of complaint and his conclusions of law thereon.

*Additional Exceptions.*

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Plaintiff,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Defendant.

Additional exceptions.

Now comes the plaintiff and by leave of the court files further exceptions to the report of the master herein as follows:

1st. Said master failed to report the adjudications or any facts relating thereto made in the years 1893 and 1894 shown by the proof, of the questions involved in the present suit.

2nd. The proof shows that in the years 1893 and 1894 like judgment was rendered for the plaintiff as the one rendered in 1887 on like issues in suits involving the same questions of fact and of law between the same parties.

3rd. The master failed to make any report in relation to said adjudications or any conclusions of law therefrom. Wherefore plaintiff prays the court to look into the evidence and make a finding therefrom of said former adjudications as claimed by the plaintiff.

W. W. BOYNTON AND
N. T. HORR,
*Sol'rs for Plff.*

Endorsements on additional exceptions.

5714. U. S. circuit court northern district of Ohio, eastern division. The Mercantile Nat'l Bank of Cleveland *vs.* R. S. Hubbard, as treasurer of Cuyahoga Co. Additional exceptions. Filed Dec. 18, 1899, Irvin Belford, clerk, U. S. circuit court, N. D. O. Boynton & Horr, sol'rs for pl'ff.

505 *Opinion of the Court.*

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, *vs.* R. S. HUBBARD, Treasurer of Cuyahoga County, Ohio. } Equity. No. 5714.

This case comes before the court on exceptions to the report of the master.

The bill was filed by The Mercantile National Bank, of Cleveland, Ohio, a banking corporation organized under the laws of the United States, and doing business in the city of Cleveland, to enjoin the county treasurer of Cuyahoga county, Ohio, from collecting taxes assessed against the holders of the shares of its capital stock, on the ground that the taxes thus assessed violate section 5219 of the Revised Statutes of the United States, which provides that the taxation of national bank shares shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such States.

The bill avers that the auditor of Cuyahoga county assessed the total ten thousand shares, of the par value of $100 each, in the complainant bank, at $519,320.00; that the State board of equalization for banks increased this valuation to $642,320; that this increase was made without notice to the complainant bank, and without giving it an opportunity to be present; that the increase by the State board of equalization was from 60 per cent. to 74 per cent. of the true value of the shares of stock; that the assessed value of other moneyed capital in the hands of citizens of Cuyahoga county and the city of Cleveland does not exceed 60 per cent. of the true value; that the State board of equalization knowingly and designedly made this discrimination against the complainant.

The bill further avers that, by section 2730 of the Revised Statutes of Ohio, under the title "taxation," the term "credits" is held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable things, or for labor or services due or to become due to the person liable to pay taxes thereon, including
deposits in banks or with persons in or out of this State, other
506 than such as are held to be money, when added together,
(estimating every such claim or demand at its true value in money), over and above the sum of legal *bona fide* debts owing by

such person; that a large amount of moneyed capital in the hands of individual citizens of the State of Ohio, invested in promissory notes and other legal obligations, is, by the aforesaid provision, allowing legal *bona fide* debts to be deducted therefrom, expressly exempted from taxation; that at least $200,000,000 of credits were exempted by this provision; that the shares of building & loan associations, created under the laws of Ohio, are, by law, to be considered as credits, and held as such; that thereby $70,000,000 was, by statute, exempted from taxation; that such building & loan associations are empowered to borrow and loan money, and do a general banking business with their members and depositors.

The bill then avers that a number of shareholders in the complainant corporation owe debts which have not been deducted from the value of their shares, though the evidence of such debts has been tendered to the county auditor. The averments of the bill are that $123,000 should be deducted from the assessment of the State board of equalization, upon which taxes to the amount of $3,726.90 have been assessed; and that there should be deducted from said assessment, also, the amount of the indebtedness of the individual stockholders of the bank, which is such a sum that the tax assessed thereon, upon the valuation fixed by the county auditor, if $3,524.78. The complainant tendered the amount due, less the sum in dispute.

The complainant further pleads a former adjudication between the complainant and Horatio N. Whitbeck, the predecessor of the defendant as treasurer of Cuyahoga county, in which it was adjudged, as between the parties, that the system of deduction of debts from credits under the statute of Ohio was a discrimination against the complainant bank, in violation of section 5219 of the Revised Statutes of the United States.

The defendant answered, making an issue upon the fact of notice to the complainant of the hearing before the State board of equalization; an issue upon the averments as to the discrimination arising from the operation of the statutes of Ohio, in allowing debts to be subtracted from credits; and an issue denying the effect claimed for the former adjudication between the complainant and the predecessor in office of the defendant.

The case was referred to a master, who has made a report. He finds that no sufficient notice was given to the complainant
507 bank of the intention to increase the assessment. He finds that the board of tax remission, organized under section 167 of the Revised Statutes of Ohio, had no authority to consider the action of the State board of equalization for banks, although it was composed of the same persons. He finds that about 1,479 of the bank's shares are held by persons whose indebtedness, over and above all other credits, exceeds the par value of these shares.

The master sets out at length a number of facts bearing upon the value of the stock of the complainant. He finds that the amount of capital stock of building & loan associations paid in 1896 amounted to $80,000,000; that the total number of shares in force was 1,389,059; that the total number of shares on which loans had been

made was 410,000; that large amounts of money were loaned in this year of 1896 by building & loan associations to non-stockholders, in such manner as to bring it into competition with national banks, and which would properly be called credits; that the value of credits, after deducting *bona fide* debts, amounted to $99,000,000; that moneys invested in bonds, stocks, joint-stock companies, annuities, and otherwise, amounted to $7,600,000 and that the valuation of State banks, as fixed by the State board of equalization, was $8,400,000; that the individual deposits in savings banks in Cuyahoga county, in 1897, amounted to $50,000,000; that real-estate mortgage debts in Ohio amounted to $259,000,000, and in Cuyahoga county to $21,000,000.

The master says that there is no evidence before him to show what portion of the credits consists of moneyed capital in the hands of individuals which in fact enters into competition for business with national banks; that there is no evidence as to what the total moneyed capital in the hands of individual citizens, and included in the term "credits" amounts to; that he is unable to ascertain or report what proportion the moneyed capital of individuals, included in the term "credits" bears to the amount invested in national bank shares; that he is unable to report whether there has, or has not, been any material discrimination, such as the Federal statute was enacted to prevent, against said complainant, and in favor of other moneyed capital in the State, outside of Cuyahoga county. The report proceeds:

"I find, however, the fact to be that in said year a large amount of moneyed capital in the hands of individual citizens of the State, invested in promissory notes and other obligations and credits, was, by section 2730 of the Revised Statutes of Ohio, authorized
508 to be exempted from taxation through the deduction therefrom of legal *bona fide* debts.

"There is nothing in the evidence that will show whether shares of incorporated banks in the counties of the State outside of Cuyahoga county were valued for taxation by the auditors at a higher or lower percentage, compared with the true value in money of their stocks, than were the banks in Cuyahoga county, and hence the master is unable to report or find whether there was any unjust discrimination as between other incorporated banks and the complainant bank, and against the complainant bank.

"An examination of the valuation of shares of banks as returned to and fixed by the State board of equalization of bank shares for 1897, discloses the fact that:

"The assessed valuation of shares of all incorporated banks in the State of Ohio, in the year 1897, exclusive of real estate, as fixed by the State board of equalization, was 61⅔ per cent. of the aggregate capital stock, surplus and undivided profits of such incorporated banks;

"That the assessed valuation of all national bank shares in Ohio, in 1897, exclusive of real estate, as fixed by the county auditors of the State, was 58.5 per cent. of the aggregate capital stock, surplus and undivided profits as reported to said auditors; which said

valuation was increased by the State board of equalization to about 59.5 per cent. of the said aggregate value of said capital stock, surplus and undivided profits, an increase of 1.6 per cent. on the valuation fixed by the auditor;

"That the assessed valuation of national bank shares in the State of Ohio for the year 1897, outside of Cuyahoga county, exclusive of real estate, as fixed by the county auditors of the State, was 58.9 per cent. of the aggregate capital stock, surplus and undivided profits as reported to such county auditors; which said valuation was decreased by the State board of equalization to 57.7 per cent. of said aggregate value of said capital stock, surplus and undivided profits, being a decrease of a little more than two per cent;

"That the assessed valuation of national bank shares in Cuyahoga county, in 1897, exclusive of real estate, as fixed by the county auditor, was 56.4 per cent. of the aggregate of the capital stock, surplus and undivided profits as reported to the auditor; which said valuation was increased by the State board of equalization to 67.8 per cent. of the capital stock, surplus and undivided profits of said banks, being an increase of a little more than 20.2 per cent. of
509 valuation; while the increase of shares of the complainant bank was a little more than 23.6 per cent.

"I find that moneyed capital in the hands of individual citizens of the city of Cleveland and the county of Cuyahoga was assessed for taxation by the assessing officers of the county, in the year 1897, and for a long time theretofore, as nearly as practicable, at sixty per cent. of its value; and that as compared with other moneyed capital in said county, the value fixed by the auditor on the stocks of said bank for the purposes of taxation was fair and equitable. And I also find that the valuation placed upon the shares of complainant bank by the State board of equalization was much higher than that fixed on other moneyed capital in the hands of individual citizens and corporations in the county of Cuyahoga and city of Cleveland, and that such action of the board of equalization was an unjust discrimination against said complainants.

"Eighteenth. By stipulation signed by the parties to said cause, it was agreed that if the court holds it competent to put in proof of taxation of moneyed capital and bank shares, outside of Cuyahoga county, that there is no discrimination for counties outside of the county of Cuyahoga, in the State of Ohio, by the taxing officers of said counties, in fixing the valuations for the purposes of taxation upon moneyed capital as against shares in incorporated banks.

"Nineteenth. I find that on the day said statement was filed with the auditor, the actual cash value of the shares of stock in complainant's bank was $128 per share, and that the value of the real estate of said bank, as it then stood upon the tax duplicate, was $117,370."

The master then files, as part of his report, a true copy of the record in the case of The Mercantile National Bank *v.* Horatio N. Whitbeck, treasurer of Cuyahoga county, Ohio.

In that bill of complaint it was averred:

"That the laws of Ohio authorize and permit the owner of credits

to deduct therefrom all debts owing by him and required him to list for taxation only the excess of credits over his indebtedness, and that such is the uniform practice throughout the State, and that under the laws of the same State the owner of capital stock of your orator is denied the right to deduct therefrom his indebtedness, but is required to list for taxation the whole number of shares owned by him and not simply the excess of the value of said shares over his indebtedness, and your orator insists that such discrimination results in the taxation of your orator's stock at a much greater rate
510 than is assessed upon other moneyed capital in the hands of individual citizens of Ohio."

Also that:

"A large amount of moneyed capital in the hands of individuals invested in promissory notes and other obligations and credits is by the aforesaid provision allowing deduction of legal *bona fide* debts to be made therefrom expressly exempted from taxation, thereby making an unjust and unlawful discrimination against moneyed capital invested in national bank shares as to which no exemption or deduction is provided for by the laws of the State."

The bill, after setting out the names of certain stockholders who claimed the right to deduct their *bona fide* debts from the value of their shares, further averred:

"That each of said above-named shareholders was indebted and owing to others of legal *bona fide* debts, a sum in excess of the credits from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares * * * which said excess of said debts over credits as aforesaid should be deducted from the assessed value of said shares so owned by him, and by reason of the facts above stated said shares of said stock should not have been placed on the tax duplicate and no tax should have been assessed thereon, * * * and your orator insists that by reason of the premises above set forth there should be deducted from the shares of capital stock owned by said shareholders above named and now standing on the tax duplicate of said county, $285,500, the par value of the shares of said stock, in all the sum of $141,543.48, according to the assessed value thereof."

The bill further averred as follows:

"Your orator avers and insists that the taxes so levied and assessed against it on account of its said shares of stock are unjust, illegal and void for the following among other reasons:

"1st. That said tax is levied and assessed against your orator directly, and is in violation of the act of Congress under which your orator is incorporated.

"2nd. That the laws of Ohio authorize and permit the owner of credits to deduct therefrom all debts owing by him, and requires him to list for taxation only the excess of credits over his indebtedness, and that such is the uniform practice throughout the State, and that under the laws of the same State the owner of capital stock of your orator is denied the right to deduct therefrom his

indebtedness, but is required to list for taxation the whole
511 number of shares owned by him, and not simply the excess of the value of said shares over his indebtedness, and your orator insists that such discrimination results in the taxation of your orator's stock at a much greater rate than is assessed upon other moneyed capital in the hands of individual citizens of Ohio."

There was a general denial of these averments, and special denials as follows:

"He (defendant) denies that any of the shareholders of said banking association at the times names in the said bill of complaint, was indebted or owing to others of *bona fide* debts a sum in excess of the credits from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of his said shares or any part thereof. He denies that either of said shareholders was then indebted in any sum whatever, or that even if any of them was so indebted as claimed in said bill of complaint, he is thereby entitled to deduct the excess of such indebtedness over his credits from the assessed value of his said shares, or that for any reason said shares of stock should not have been placed on the tax duplicate and no tax assessed thereon. * * * He denies that any sum whatever should be deducted from the valuation of the shares of the capital stock owned by said shareholders named in said bill of complaint. He denies that the laws of Ohio authorize and permit the owner of credits to deduct therefrom all debts owing by him, or that such is the uniform practice throughout the State. He denies that the taxation of shares of said complainant's stock is at a much or any greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State. He denies that the necessary effect of the proceedings had in the assessment and levy of the tax standing against said complainant and the shares thereof owned by its said shareholders, has been to deprive said complainant or said shareholders * * * of any security denied them by the limitation of said act of Congress."

A large amount of evidence seems to have been taken in the case, though that has not been produced in evidence before the master, or called to the attention of the court.

The case was referred to a special master, and then came on for final hearing. A decree was entered, reciting that the court, being fully advised in the premises, from the testimony and exhibits, and the special master's report, adduced in open court, did find all the allegations of the bill to be true, except certain averments
512 which are not here material, and enjoined the collection of $3,967 of tax assessed against the complainant.

As conclusions of law, the master found that the action of the State board of equalization, in increasing the assessment, was invalid for want of notice to the bank, and that the State board of tax remission had no jurisdiction to set aside or reconsider that assessment.

The master further found that the valuation of the auditor was 60 per cent. of the aggregate capital stock, surplus and undistributed profits; that the State board of equalization increased this valuation

to 70 per cent. of the aggregate capital stock, surplus and undivided profits; that the valuation of property generally in Cuyahoga county was but 60 per cent.; and that this was a discrimination against the property of the bank of 10 per cent., which should be enjoined.

The master further found that the decree in the Whitbeck case was not a former adjudication of the issues in this case.

TAFT, *Circuit Judge:*

I am not able elaborately to state the reasons for my conclusions in this case. I think it better, in view of the fact that the case will certainly be appealed, that I should simply give them, with a very summary statement of my reasons.

Upon the first issue, whether the action of the State board of equalization was invalid for want of notice, I do not find it necessary to pass. The action of the State board was embodied in a report to the county auditor, and by him placed upon the duplicate, so that it now appears on the face of the duplicate as a lawful warrant for the collection of the tax.

This proceeding is a bill in equity to enjoin the collection of the tax, on the ground that it was assessed without due notice to the complainant. If the tax assessed is no greater than ought to have been assessed, then the complainant is not in a position to ask the intervention of a court of equity, because, however irregular the action of the State board may have been, if the complainant cannot make it clear that, by a hearing upon notice, it would have been entitled to an assessment less than that which was made, the bill must be dismissed.

The master finds that the actual market value of the stock is
513 $128 per share. There are 10,000 shares of the stock, making a total valuation of $1,280,000. Sixty per cent. of this valuation would be $768,000. Deducting the assessed value of the real estate, would leave a valuation of $650,630. The assessment of the State board is $642,000. It will be seen that the assessment of the State board of equalization is certainly only 60 per cent. of the actual value of the shares of stock in the market. The finding of the master is that there is nothing in the evidence to show whether the shares of incorporated banks in the counties of the State outside of Cuyahoga county were valued for taxation by the auditors at a higher or lower percentage, compared with the true value of their stocks, than were the banks in Cuyahoga county, and hence the master is unable to report or find whether there was any unjust discrimination as between other incorporated banks and the complainant bank, and against the complainant bank.

The other findings of the master as to the percentage of the aggregate capital stock, surplus and undivided profits assessed for taxable valuation by the State board of equalization of all incorporated banks and of all national banks and national bank shares outside of Cuyahoga county, therefore furnish no basis for concluding what relation the assessed percentage of the aggregate capital, surplus and undivided profits has to the market, and actual value of the stock.

I am unable to find, therefore, in the grounds upon which the master proceeded, any predicate for the assumption that the other banks in the State were taxed at any less than 60 per cent. of the actual market values of their shares; and, if they were not so taxed, then there is no ground for claiming that there was any discrimination in the action of the State board of equalization in assessing the value at 60 per cent. of its actual value. There is no better evidence of the actual value of bank shares than the market value. It seems to me that the findings of the master upon this point, therefore, are inconsistent; and the exception to them must be sustained.

In that view it becomes important to decide, as already stated, whether or not the notice of the action by the State board of equalization was sufficient.

The next question is whether the operation of the statutory definition of "credits" to be returned for taxation in Ohio operates to discriminate in favor of other moneyed capital in the State against national bank shares. Upon this point, the decision in the case of National Bank of Wellington *v.* Chapman, 173 U. S. 205, leaves no doubt. In that case, it was held that the term "moneyed capital," as used in the Federal statute, does not include capital which
514 does not come into competition with the business of national banks, and that exemptions from taxation, however large, such as deposits in savings banks, or moneys belonging to charitable institutions, which are exempted from reasons of public policy, and not as an unfriendly discrimination against investments in national bank shares, cannot be regarded as forbidden by the Federal statute. The court then proceeded:

"With no purpose to discriminate against the holders of shares in national banks, and with the taxation of the shareholders in the two classes of banks, State and national, precisely the same, the question is whether this system of taxation in Ohio, in its practical operation, does materially discriminate against the national bank shareholder in the assessment upon his bank shares."

The court then proceeded to treat the question of such discrimination as a question of fact, to be determined by the evidence, and reference was made to the report of the auditor to show what the total credits upon which taxation was laid, after deducting the debts allowed, were. It was pointed out that the deductions which might be made included deductions for many other things than what would be strictly moneyed capital within the meaning of section 5219, and that there was nothing in the evidence then before the court to enable it to say how much of these deductions was moneyed capital within the meaning of that section.

I do not find that there was anything more of substance before the master than there was before the supreme court upon this issue of fact. There is proof of the capital in savings banks, and also of the capital invested in building & loan associations; but, under the decision of Mercantile National Bank *v.* New York, 121 U. S. 138, capital invested in savings banks cannot be regarded as moneyed capital within the meaning of section 5219, exemption of which from taxation can constitute a discrimination within the inhibition of that

section. It seems to me that building associations are certainly not to be differentiated in their purpose, or object, or practical effect, from savings banks; and that the capital invested in them, though subject to a somewhat different rule of taxation, cannot be regarded as moneyed capital in competition with the moneyed capital in national banks, any more than is capital invested in savings banks. The chief object of building associations is to encourage the building of small houses by poor people, and the saving from their earnings, week by week, of an amount sufficient to pay the mortgage
515 debts incurred in the purchase of the land and the construction of the house. The mere fact that every shareholder in a building association need not be a borrower cannot, I think, change the effect of the general purpose of the building-association law.

The general result of the evidence is no more satisfactory as showing what amount of discrimination, if any, there is by reason of this definition of credits in the Ohio statute of taxation than it was in the case of National Bank of Wellington *v.* Chapman. For this reason, I must conclude, as the master did, that the averments of the bill as to the discrimination, arising from the operation of this definition of "credits," against moneyed capital, is not such as to justify any action by the court in the complainant's favor.

There remains to be considered the question arising under the claim of former adjudication, made in the bill. Upon the argument, and before I had made a close examination of the bill, my impression was that upon this claim of former adjudication the complainant must succeed. It seemed to me that the adjudication in the former case was a mere adjudication of the necessary operation of the statute of Ohio to discriminate against national banks, and therefore that, that question having been in judgment between the same parties, it must receive the same adjudication here. Looking into the bill, however, in the former case, and after an examination of the case of National Bank of Wellington *v.* Chapman, I find that, in order to support the averments of the bill, it was necessary in that case for the complainant to rely, not only upon the statute of Ohio defining credits, but also on its practical operation in exempting moneyed capital in the hands of individuals in Ohio from taxation. The practical operation of a law of that character, to show how much, if any, discrimination there is, is a question of fact to be determined upon the evidence. A large amount of evidence was taken in the former suit, and the court, in its decree, found the averments of fact as to the practical operation of the law of Ohio, in the bill, to be fully sustained. In other words, the court found the fact to be that for the years then involved the statute of Ohio, as enacted, operated to exempt so large an amount of the moneyed capital in the hands of individuals in that State as to discriminate against the holders of the complainant's shares, and result in the taxation of the stock at a much greater rate than was assessed upon other moneyed capital in the hands of individual citizens of Ohio. The adjudication, therefore, upon which the complainant relies, is an ad-
516 judication, not of law, but of fact; not of the fact at issue in the present case, but of the fact as to the practical operation

of the law at the time of that adjudication, to wit, in 1887, in 1893, and in 1894.

In this aspect, the fact as to the practical operation of the law in 1896 may be different from that in 1887, and the other years. A finding of a condition in 1887 does not conclusively establish the existence of the same condition in 1896 and 1897.

For this reason, I cannot sustain the contention made on behalf of the complainant that the former adjudication conclusively entitles the complainant to the same relief as that which was granted it in the Whitbeck case.

The exceptions to the master's report on this ground are, therefore, overruled.

The result is that the preliminary injunction must be dissolved and the bill dismissed at complainant's costs. The same order must be made in the other cases which it is agreed depend on this.

WM. H. TAFT,
*Circuit Judge.*

Dec. 23, '99.

Endorsements on opinion of court.

5714. United States circuit court, northern district of Ohio, eastern division. The Mercantile National Bank of Cleveland, Ohio, *v.* R. S. Hubbard, treasurer of Cuyahoga county, Ohio. Opinion of the court. Filed Dec. 23, 1899. Irvin Belford, clerk, U. S. circuit court, N. D. O.

*Final Decree.*

October Term, A. D. 1899, to wit, December 23rd, A. D. 1899.

Present: The Honorable William H. Taft, U. S. circuit judge, and Honorable Augustus J. Ricks, U. S. district judge.

| | | |
|---|---|---|
| The Mercantile National Bank of Cleveland *vs.* R. S. Hubbard, as Treasurer of Cuyahoga County. | 5714. | Chancery. |

This cause came on for final hearing on the master's report, 517 the exceptions thereto and the evidence and proofs in the case, and the court being fully advised in the premises, doth order and decree that the exceptions of the plaintiff to the report of the master be and the same are hereby overruled, and the exception of the respondent to the master's conclusion of law from the facts relating to the increase of the valuation of the shares of complainant by the State board of equalization for banks is sustained, and on the report of said master and the evidence in the case,

It is ordered, adjudged and decreed that the said bill of complainant herein be and the same is hereby dismissed with costs to the defendant to be taxed.

And the cause coming on for further hearing on the plaintiff's

motion for the allowance of an appeal from said decree, to the circuit court of appeals, the said application for such appeal is hereby allowed, and the preliminary injunction herein continued on the plaintiff's executing an appeal bond in the sum of two hundred and fifty dollars ($250.00).

*Application for Appeal.*

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF Cleveland, Complainant,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Defendant. } No. 5714. In Equity.

Application for appeal by plaintiff.

The above-named complainant conceiving itself aggrieved by the decree made and entered, on the 23rd day of December, in the above-entitled cause, does hereby appeal from said order and decree to the United States circuit court of appeals for the sixth circuit, for the reasons specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree were made, duly authenticated, may be sent to the United States circuit court of appeals for the sixth circuit.

W. W. BOYNTON &
N. T. HORR,
*Solicitors for Plaintiff.*

518 Endorsements on application for appeal.

5714. The Mercantile National Bank of Cleveland *v.* R. S. Hubbard, as treasurer of Cuyahoga Co. 5714. Application for appeal. Filed Jan. 5, 1900. Irvin Belford, clerk, U. S. circuit court, N. D. O.

*Assignment of Errors on Appeal.*

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Complainant,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Defendant.

Assignment of errors on appeal.

The plaintiff makes the following assignment of errors which he avers occurred in the trial of this cause, and prays for reversal of the decree of the circuit court and for a decree and judgment as prayed for by it in its original bill.

First. The court erred in holding that it was immaterial whether the action of the State board of equalization for banks in increasing the valuation of complainant's shares was invalid for want of notice to the bank or its shareholders of the time said board would consider the question of the sufficiency of the auditor's valuation and affording them an opportunity for a hearing.

Second. The court erred in holding and deciding that other banks in the State were not taxed at less than sixty per centum (60 per cent.) of the actual market value of their shares, and if they were not so taxed, then there was no ground for claiming that there was any discrimination in the action of the State board of equalization for banks in assessing the value of the shares of the plaintiff, and that in view of such fact, it became unnecessary to decide whether or not the notice of the action of the State board was sufficient.

Third. The court erred in holding that if the tax assessed against the shareholders of the bank is no greater than ought to have
519 been assessed under the law, then the plaintiff is entitled to no relief whether the State board had jurisdiction to increase the auditor's valuation or not.

Fourth. The court erred in failing and refusing to decide that the action of the State board of equalization for banks in increasing the valuation of the auditor was void for want of jurisdiction to act at the time the board took the action complained of, and in refusing to enjoin the tax levied and assessed on the amount so added to the valuation of the auditor by the State board of equalization.

Fifth. The court erred in holding and deciding that the former adjudications between the complainant and treasurer of Cuyahoga county in 1887, 1893 and 1894, shown by the record thereof put in evidence *was* not conclusive of the right of the shareholders of the plaintiff to deduct their *bona fide* indebtedness from the value of their shares in fixing the value of the latter for taxation.

Sixth. The court erred in holding that in the former cases it was necessary to rely not only on the statutes of Ohio and of the United States, but on the practical operation of the laws of Ohio in exempting moneyed capital in the hands of individual citizens of the State on taxation—that it was necessary to show the practical operation of the law was such as to show a material discrimination.

Seventh. The court erred in holding that the former adjudications relied on were of fact, and not of law, and of the fact of the practical operation of the law in 1887, 1893 and 1894.

Eighth. The court erred in overruling the exceptions of the complainant to the master's report, and in refusing judgment for the complainant on the ground that the former adjudications were conclusive of its right thereto.

W. W. BOYNTON &
N. T. HORR,
*Sol's for Pl'ff* ——.

Endorsements on assignment of errors.

No. 5714. The Mercantile National Bank of Cleveland *vs.* R. S. Hubbard, as treas. of Cuyahoga Co. Assignment of errors. Filed Jan. 5, 1900. Irvin Belford, clerk U. S. circuit court, N. D. O. W. W. Boynton & N. T. Horr, sol's for pl'ff.

520 *Appeal Bond.*

United States Circuit Court, Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Ohio, Plaintiff,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Defendant.
} Appeal Bond.

Know all men by these presents, that we, The Mercantile National Bank of Cleveland, O., as principal, and E. R. Perkins and Charles L. Murfey, as sureties, are held and firmly bound unto the defendant, R. S. Hubbard, as treasurer of Cuyahoga county, Ohio, or his successors in office, in the full and just sum of two hundred and fifty dollars ($250) to be paid to the said defendant or his successors in office his certain attorneys, executors, administrators or assigns to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this fifth day of January, in the year of our Lord one thousand nine hundred.

Whereas, lately at a circuit court of the United States for the northern district of Ohio, eastern division, in a suit depending in said court between said The Mercantile National Bank, plaintiff, and the said R. S. Hubbard, as treasurer of the county of Cuyahoga, Ohio, defendant, a decree was rendered against the said The Mercantile National Bank, and the said bank having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the said decree in the aforesaid suit and a citation directed to the said R. S. Hubbard, as treasurer aforesaid, citing and admonishing him to be and appear at a session of the United States circuit court of appeals for the sixth circuit to be holden at the city of Cincinnati in said circuit on the 4th of February next.

Now, the condition of the above obligation is such that if the said The Mercantile National Bank shall prosecute said appeal to effect and answer all damages and costs if it fail to make the said appeal good, then the above application to be void, else to remain in full force and virtue.

[CORPORATE SEAL.] MERCANTILE NATIONAL BANK,
By CHAS. L. MURFEY, *Cashier.*
E. R. PERKINS, [SEAL.]
CHAS. L. MURFEY.

521 Sealed and delivered in the presence of:
H. F. RISSER.
N. T. HORR.

Approved by:
A. J. RICKS,
*U. S. Judge, &c.*

Endorsements on appeal bond.

5714. U. S. circuit court, northern district of Ohio, eastern division. The Mercantile Nat'l Bank of Cleveland, plaintiff, *vs.* R. S. Hubbard, as treas. of Cuyahoga county, Ohio, defendant. Appeal bond. Filed Jan. 5, 1900. Irvin Belford, clerk U. S. circuit court, N. D. O.

*Citation.*

UNITED STATES OF AMERICA, }
*Sixth Judicial Circuit.* }

The United States Circuit Court of Appeals for the Sixth Circuit.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, Plaintiff,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Defendant.

To R. S. Hubbard, as treasurer of Cuyahoga county, Ohio, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals, for the sixth circuit, to be holden at the city of Cincinnati, in said circuit on the 4th day of Feb'y, next, pursuant to an appeal of said cause filed in the clerk's office in the circuit court of the United States for the northern district of Ohio, wherein said The Mercantile National Bank is plaintiff and you are defendant, to show cause if any there be, why the judgment rendered against the said plaintiff, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 5th day of January, in the year of our
522 Lord one thousand nine hundred, and of the Independence of the United States of America, the one hundred and twenty-fourth.

WM. H. TAFT,
*U. S. Circuit Judge.*

*U. S. Marshal's Return.*

THE UNITED STATES OF AMERICA, }
*Northern District of Ohio,* } *ss:*

Received this writ on the 27th day of January, 1900, and on the same day I served the same at Cleveland, on the within-named R. S. Hubbard, as treasurer of Cuyahoga county, Ohio, by delivering a true and certified copy thereof to P. H. Kaiser, county solicitor, and the attorney of record for said defendant.

M. A. SMALLEY,
*U. S. Marshal,*
By W. S. SNYDER, *Deputy.*

*Fees.*

| | |
|---|---|
| Service | $2 00 |
| Travel | 06 |
| Total | $2 06 |

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF Cleveland, Ohio, *vs.* R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio. } No. 5714. Chancery.

NORTHERN DISTRICT OF OHIO, *ss:*

I, Irvin Belford, clerk of the circuit court of the United States for said district, do hereby certify that the annexed and foregoing pages embraced in volume 3 contain a full and true copy of the depositions of Peter H. Fahey, G. N. Calvert, S. C. Hale, Frank J. Smith, Charles L. Murfey, W. D. Guilbert, G. W. Taylor, exceptions to master's report, exceptions and stipulations, and there is annexed to and transmitted with such record, the citation issued and allowed in the above cause.

523 In testimony whereof, I have hereunto signed my name and affixed the seal of said court, at Cleveland, in said district, on this 31st day of January, A. D. 1900, and in the 124th year of the Independence of the United States of America.

[SEAL.] IRVIN BELFORD, *Clerk*,
By JNO. VAN NOSTRAN, *Deputy*.

521 And afterwards, to wit, on the 7th day of February, A. D. 1900, the following appearance was filed.

United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1899.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Appellant, *vs.* R. S. HUBBARD, as Treas. of Cuyahoga Co., Appellee. } No. 817.

To the clerk of said court:

Please enter our appearances as counsel for the appellant.

W. W. BOYNTON.
NORTON T. HORR.

And afterwards, to wit, on the 5th day of April, A. D. 1900, the following stipulation was filed.

United States Circuit Court of Appeals, Sixth Circuit.

THE MERCANTILE NATIONAL BANK OF Cleveland, Appellant,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Appellee.
} No. 817. Stipulation.

It is hereby stipulated by and between the appellant and the appellee that the rule days for filing printed briefs in this cause may be extended provided the court consents thereto, as follows: The appellant to file its brief by May 12th, 1900, and the appellee to file his printed brief by June 9th, 1900.

W. W. BOYNTON AND
NORTON T. HORR,
*Attorneys for Appellant.*
525 SMITH W. BENNETT,
*Attorney for Appellee.*

And afterwards, to wit, on the 8th day of May, A. D. 1900, the following order was made.

MERCANTILE NATIONAL BANK
*vs.*
R. S. HUBBARD, Treasurer.
} # 817. Lurton, Day & Severens.

The motion of Mr. Smith W. Bennett for an extension of time to May 22nd inst. to file his brief is granted.

And afterwards, to wit, on the 22d day of May, A. D. 1900, the following order was made.

MERCANTILE NATIONAL BANK
*vs.*
R. S. HUBBARD, Treas., etc.
} # 817. Lurton, Day & Severens.

This cause coming on to be heard this day was argued by W. W. Boynton for the appellant and by Smith W. Bennett for the appellee and submitted.

And afterwards, to wit, on the 10th day of December, A. D. 1900, the following decree was entered.

526 *Decree.*

United States Circuit Court of Appeals for the Sixth Circuit.

MERCANTILE NATIONAL BANK
*v.*
R. S. HUBBARD. } No. 817.

Appeal from the circuit court of the United States for the northern district of Ohio.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court, in this cause be and the same is hereby reversed with costs and the cause is remanded to the said circuit court for further proceedings in accordance with the opinion of this court.

Approved:

DAY.

527 And afterwards, to wit:—on the 13th day of December, A. D. 1900, the following application for appeal was filed.

In the United States Circuit Court of Appeals for the Sixth Circuit.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Complainant,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Defendant. } No. 817. In Equity.

*Application for Appeal.*

The defendant says that conceiving himself aggrieved by the decree made and entered on the tenth day of December, A. D. 1900, in the above-entitled cause, does hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record proceedings and papers upon which said order and decree were made, duly authenticated, may be sent to the Supreme Court of the United States.

P. H. KAISER,
*County Solicitor,*
FREDERICK L. TAFT,
*Ass't County Solicitor,*
J. M. SHEETS,
*Att'y General of Ohio,*
*Solicitors for Defendant.*

SMITH W. BENNETT, *Of Counsel.*

December 13th, 1900.

The foregoing appeal is allowed.
December 13th, 1900.

H. F. SEVERENS,
*Circuit Judge.*

528 And afterwards, on the same day to wit, on the 13th day of December, A. D. 1900, the following assignment of errors on appeal was filed.

In the United States Circuit Court of Appeals for the Sixth Circuit.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, Complainant,
*vs.*
R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Defendant.

*Assignment of Errors on Appeal.*

And now on the 13th day of December, A. D. 1900, came the said defendant by his solicitors and says that the order and decree in said cause rendered by the United States court of appeals for the sixth circuit, is erroneous and against the just rights of said defendant, for the following reasons:—

First. The court erred in reversing the order and decree of the said circuit court of the United States for the northern district of Ohio.

Second. The court erred in finding for the said complainant and against the said defendant.

Third. The court erred in holding and deciding that the former adjudication between the complainant and treasurer of Cuyahoga county, Ohio, in 1887, 1893 and 1894, shown by the record
529 thereof put in evidence, was conclusive against the rights of the defendant herein, whereby it concluded the said defendant from refusing to allow the shareholders of the said complainant to deduct their *bona fide* indebtedness from the value of their share in fixing the value of the latter for taxation.

Fourth. The court erred in holding and deciding that the former adjudication between the complainant and treasurer of Cuyahoga county, Ohio, in 1897, 1893 and 1894, as shown by the record, was conclusive of the rights of the shareholders of the complainant to deduct their *bona fide* indebtedness from the value of their shares in fixing the value of the same for taxation.

Fifth. The court erred in holding that the tax assessed against the shareholders of the complainant is greater than ought to have been assessed under the law.

Sixth. The court erred in holding that the allowance of various exemptions from taxation of money capital in the hands of individual citizens of Ohio as set forth in the complainant's bill of complaint, under the laws of the State of Ohio, result in and make an unjust and unlawful discrimination against moneyed capital invested in national bank shares, and in violation of the restrictions of section 5219 of the Revised Statutes of the United States.

Seventh. The court erred in holding and deciding that the action of the State board of equalization for banks, in increasing the valuation fixed by the auditor, was void for want of jurisdiction
530 to act at the time the board took the action complained of, and in enjoining the tax levied and assessed on the amount so added to the valuation of the auditor by the State board for the equalization of banks.

Eighth. The court erred in holding and deciding that the action of the State board for the equalization of banks, in increasing the valuation of complainant's shares, was invalid for want of notice to the bank or its shareholders, of the time said board would consider the question of the sufficiency of the auditor's valuation and affording them an opportunity for a hearing.

Ninth. The court erred in holding and deciding that the equities of the cause were with the said complainant, because the finding of the master and the evidence taken in said cause expressly show that the true value in money of complainant's shares after deducting the value of the real estate of said bank, as it stood on the duplicate upon the day that the statement was filed with the county auditor by the cashier of said complainant bank, was far in excess of the valuation placed on complainant's shares by said State board of equalization for banks, and thereby complainant's shares were listed for taxation at a far less valuation than the money capital of all other persons within said Cuyahoga county and the State of Ohio.

Tenth. The court erred in holding and deciding that the complainant bank had the right to deduct its *bona fide* indebted-
531 ness from the valuation of its shares, and thus decrease the valuation of such shares before listing the same for taxation.

Eleventh. The court erred in sustaining the exceptions of the complainant to the decree of the circuit court, and in rendering judgment for the complainant.

P. H. KAISER,
*County Solicitor.*
FREDERICK L. TAFT,
*Ass't County Solicitor.*
J. M. SHEETS,
*Att'y General of Ohio.*

SMITH W. BENNETT,
*Of Counsel for Defendant.*

And afterwards, and on the same day to wit, on the same day, the following bond was filed.

532 *Bond on Writ of Error or Appeal.*

Know all men by these presents, that we, M. A. Lander, as treasurer of Cuyahoga county, Ohio, as principal, and Frederick L. Taft, as sureties, are held and firmly bound unto The Mercantile National Bank of Cleveland, Ohio, in the full and just sum of five hundred dollars to be paid to the said The Mercantile National Bank of Cleveland, Ohio, its certain attorneys, executors, administrators or

assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirteenth day of December, in the year of our Lord one thousand nine hundred.

Whereas, lately at a session of the United States court of appeals for the sixth circuit, in a suit depending in said court, between Mercantile National Bank of Cleveland, Ohio, and R. S. Hubbard as treasurer of Cuyahoga county, Ohio, a decree was rendered against the said M. A. Lander, successor to R. S. Hubbard as treasurer of Cuyahoga county, Ohio, and the said M. A. Lander, successor to R. S. Hubbard as treasurer of Cuyahoga county, Ohio, having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said The Mercantile National Bank of Cleveland, Ohio, citing and admonishing it to be and appear at a session of the United States Supreme Court to be holden at the city of Washington, in said circuit, on the — day of —— next.

Now, the condition of the above obligation is such, that if the said M. A. Lander, as successor of R. S. Hubbard as treasurer of Cuyahoga county, Ohio, shall prosecute appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

M. A. LANDER, [SEAL.]
*As Treasurer of Cuyahoga County, Ohio,*
By P. H. KAISER AND [SEAL.]
F. L. TAFT, [SEAL.]
*His Solicitors.*
FREDERICK L. TAFT. [SEAL.]
SMITH W. BENNETT.

Sealed and delivered in presence of—
—— ——.

Approved by—
H. F. SEVERENS,
*Circuit Judge.*

533 STATE OF OHIO, } ss:
*Hamilton County,* }

Frederick L. Taft and Smith W. Bennett, sureties on the appeal bond of the defendant, in a cause now pending in the circuit court of appeals for the sixth circuit, entitled, The Mercantile National Bank of Cleveland, Ohio, plaintiff, against, R. S. Hubbard, treas'r of Cuyahoga Co., Ohio, wherein appeal is taken to the Supreme Court of the United States, being duly sworn depose and say: That they and each of them are freeholders within the State of Ohio, and that they and each of them, are worth more than double the amount of said bond for which they stand as sureties, over and above the amount of all incumbrances or indebtedness.

FREDERICK L. TAFT.
SMITH W. BENNETT.

Sworn to before me and signed in my presence, this 13th day of December, A. D. 1900, by the said Fred'k L. Taft and Smith W. Bennett.

B. E. DILLEY,
*Dep. Clk U. S. Cir. Court — Appeals.*

And afterwards, to wit, on the 28th day of December, A. D. 1900, the following opinion was filed:

534 United States Circuit Court of Appeals, Sixth Circuit.

| | |
|---|---|
| THE MERCANTILE NATIONAL BANK of Cleveland, Appellant, *v.* R. S. HUBBARD, as Treasurer of Cuyahoga County, Ohio, Appellee. | No. 817. Appeal from the Circuit Court of the United States for the Northern District of Ohio. |

Submitted May 22, 1900; decided Dec. 10, 1900.

Before Lurton, Day, and Severens, circuit judges.

The bill in this case sought to restrain the collection of certain additional taxes imposed on shares of stock in the bank by virtue of an order of the State board of equalization for the State of Ohio for the year 1897. It was also sought to enjoin the collection of the tax levied upon said shares held by certain stockholders upon the ground that the stockholders named were, on the taxing day of that year, lawfully indebted to others in *bona fide* debts in excess of all their other credits in a sum equal to or exceeding the value of the shares of appellant's stock so held by them. It is also claimed that the refusal to permit such reduction was a violation of sec. 5219 of the Revised Statutes of the United States restricting the rate of taxation on shares of national banks to that assessed upon other money capital in the hands of individual citizens of the State. It was further alleged that said shareholders were entitled to such deduction on the ground that their right thereto had theretofore been adjudicated by the circuit court in actions between the appellant and the then treasurers of Cuyahoga county, which adjudications were in full force and operation, were between the same parties and involved the same subject-matter. The case was referred to a special
535 master, and his report is fully set forth in the record. Upon this appeal two propositions are urged upon the attention of the court. 1. Alleged error in the action of the circuit court in holding that the increase by the State board of equalization, without notice, afforded no ground of relief. 2. Error in the failure of the court to sustain the bill on the ground of former adjudications as set up in the record and disclosed in the testimony. As to the claim of *res adjudicata* the facts sufficiently appear in the opinion of the court upon that subject. As to the claim that the State board of equalization met and acted without notice, the master finds the following facts:

"Sixth. Said county auditor made out and transmitted to the annual State board of equalization for incorporated banks, a copy of the report so made by the cashier of complainant bank, together with the valuation of such shares as so fixed by him, on the 19th day of July, 1897. There was attached to said report a copy of the report of the Mercantile National Bank of Cleveland, Ohio, to the Comptroller of the Currency made next prior to the second Monday of May, 1897, to wit, May 14, 1897.

"Seventh. That the said board of equalization for incorporated banks, composed of the governor, auditor of State and attorney general, convened on the third Tuesday, being the 15th day of June, 1897, at the office of the State auditor, as required by section 2808, Revised Statutes of Ohio, and organized by the election of the governor as president of the board, and G. W. Taylor, chief clerk, in the office of the auditor, as secretary, and adjourned at the call of the secretary, transacting no other business at that meeting; that the members composing said board next met on the 7th of September, 1897, but took no action relating to the valuation of shares of the plaintiff, and adjourned; that two members of said board, with said secretary, met on the 10th day of September, 1897, but took no action relating to the shares of the plaintiff bank, and adjourned; that on the 20th day of September, 1897, the members of said board met, but took no action relating to the valuation of the shares of plaintiff, and adjourned; that on the 4th day of December, 1897, the members of said board next met at the call of the State auditor to consider unfinished business. The record of the meetings of said board, as originally made by the secretary, shows that at the meeting held June 15, 1897, September 10, 1897, September 20, 1897, the 'board adjourned.' At the meeting held December 4, 1897, the secretary was directed to amend the record as to each of said above-named adjournments by adding these words: 'Amended to read, "adjourned to meet at the call of the president of the board. Asa S. Bushnell, governor of the State,"' and thereupon said board adjourned *sine die*. Some time after December 4, 1897, the record was amended by the secretary as directed by said board. At none of said adjournments was a day named for the next meeting.

536 "Eighth. At said meeting on December 4, 1897, without complaint from any one, the members of said board assuming to act as a board, increased the valuation of the shares of the plaintiff from $519,320.00, so fixed by the county auditor, to $642,320.00, and on the 6th day of December certified said valuation to the auditor of Cuyahoga county to be by him placed on the treasurer's duplicate, which was accordingly done; that neither of said meetings of the members of said board following the third Tuesday of June, 1897, was called by said secretary, and no notice or information of any kind or opportunity to be heard was given by said board, its secretary or any other person to said bank, or any of its officers, directors or shareholders of any or either of said meetings, except such as the statute gave them, to wit: section 2808, Revised Statutes, and succeeding sections; nor did they, or either of them, have any notice of any of said meetings or appear thereat,

and the first information that said bank or any of its shareholders had or received of any action of the board or of the purpose to increase the value of the shares so fixed by the auditor was on the 7th day of December, 1897, after the action of the board was had and such information was conveyed by letter from the auditor of the county to the cashier of the plaintiff, notifying him of the completed action of the board; that thereupon, said bank and its shareholders, through the officers and agents of the bank duly authorized, applied to the members of said board for a hearing, and was notified that two of the members of said board were out of the State, and that December 28th was as early as the bank officers could be received; that on said day the officers of said bank on behalf of said shareholders duly authorized, met the members of said board at Columbus, and made application for a hearing respecting the valuation of said shares and the action of said board, and notified said members of said board that such increase made on the shares of said bank was excessive and unwarranted, and protested against the same, but said hearing was denied, the members of said board declaring that the board had adjourned *sine die* and could not reconvene as a State board of equalization for banks to consider any claim or application respecting the value of said shares.

"At the time the persons who had composed the State board of equalization for banks, and who are the same persons required to act under section 167 of the Revised Statutes of Ohio, offered to convene and organize under said section 167 to consider the case of the various plaintiff banks at such time as might be convenient for the representatives of the Cleveland banks to appear. Some doubt was expressed by some of the members of the committee that the board would not have the power under section 167 to afford as full relief as the board of equalization and only one of the Cleveland banks appeared before the board when organized under section 167, viz., the First national bank, the others declined to appear.

"Ninth. That the said auditor of said county of Cuyahoga,
537 upon the receipt of the certificate from said State board of equalization entered said valuation of $642,320.00 upon the tax duplicate of said county for the year 1897, and assessed against the same taxes at the rate of 3.03 cents on each dollar, and which amounted on said valuation to $19,462.30. The taxes on said bank shares at the said rate of 3.03 on each dollar, if assessed on the valuation of $519,320.00, as fixed by the auditor of Cuyahoga county, would have amounted to the sum of $15,735.39."

The master reported as his conclusion of law that the attempted increase was void for want of notice to the tax-payer of the meeting at which the increase was ordered by the board.

DAY, circuit judge, after stating the foregoing facts, delivered the opinion of the court.

The learned circuit judge, in disposing of the matter of the increase of the valuation of the stock in complainant bank made by the State board of equalization for incorporated banks, expressed the opinion that the tax actually assessed, being no greater than

ought to have been assessed considering the market value of said stock, the complainant was not in a position to ask a court of equity to intervene, and he therefore declined to consider the irregularity in the action of the State board. The statute of Ohio, section 2808, fixes the time for the meeting of the State board. This board is required to meet on the third Tuesday of June, annually, at the office of the auditor of State, and examine the returns of said banks to the county auditors, and the value of said shares as fixed by the county auditors, as the same shall have been reported by the county auditors to the State auditor. At this meeting it was provided, section 2809, that said board shall hear complaints and equalize the value of said shares according to the rules prescribed in title 13 for valuing and equalizing the values of real and personal property. Looking to the other sections of the statute contained in this title we find that it is provided in section 2804 that the annual county board shall not increase or reduce the valuation of any real estate except in cases of gross inequality, and then only upon reasonable notice to all persons directly interested, and an opportunity for a full hearing upon the question involved. Section 2807 provides, speaking of the powers of city boards to hear complaints, that "no such addition shall be made to such list returned under oath without the board having first given reasonable notice to the person or persons whose personal property is sought to be added to, or the valuation thereof increased, to appear before
538 said board at a time and place to be fixed by said board, and show cause why such addition should not be made, or why such valuation should not be increased." These statutes construed together, we think, require that the State board of equalization, before it can increase the value of shares of incorporated banks, shall give notice to persons affected by its action. Undoubtedly the notice prescribed by the statute for the meeting of the board on the third Wednesday in June is sufficient notice to the parties that the board will meet on that day, and tax-payers are bound to take notice of the time and place fixed by law. This was the holding of the supreme court of Ohio in the case of Hambleton *v.* Dempsey, 20 O. 168. But in the present case it appears from the finding of the master that on a day appointed by law for the meeting of the board, it convened at the office of the State auditor, but took no action at that meeting except to adjourn to meet at the call of the secretary. Subsequent meetings were held on the 7th, 10th and 20th of September, at none of which was any action taken as to the valuation of the shares of complainant bank. At none of these meetings was an adjournment had to a day certain. At the meeting of December 4th, an amendment of the record was made to show that adjournments were to meet at the call of the president of the board. At the meeting of December 4th, the valuation of the shares of the bank was increased from $519,320.00 to $642,320.00, and no notice was given of any of these meetings. We are of opinion that the statutes of Ohio requiring notice must be complied with in order to give jurisdiction to such a tribunal as the State board of equalization to act upon the property rights of holders of bank stock. An examination of the board record

before December 4th would have shown the tax-payer that the board had adjourned without action upon his stock. Nothing recorded notified him of any time or place where he might appear and present his case to the board. In the absence of a statutory requirement we are of opinion that such action could not be taken as would affect a citizen's property rights by increasing the value of his property for taxation without giving him an opportunity to be heard. In Desty on Taxation, vol. 1, at page 597, it is said:

"It is a fundamental principle that before a person can be deprived of a right, even by a judicial suit, he must have notice and reasonable opportunity to be heard in defense of his rights.

"A tribunal invested by law with power to affect the prop-
539 erty of a subject is bound to give such subject an opportunity of being heard before it proceeds. The rule is of universal application, and is founded on the plainest principles of justice."

In Hoevy *v.* Elliot, 167 U. S. 409, Mr. Justice White said:

"Wherever one is assailed in his person or his property, there may he defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

Numerous other authorities might be cited to sustain this proposition, but we deem it unnecessary to amplify the opinion upon this branch of the case. It is an elementary principle of law that tribunals vested with power to affect the property of citizens must act with notice. He must have opportunity to be heard, and a statute which undertakes to give the right to such tribunals to interfere with property of citizens, without hearing, deprives him of a privilege long secured by the common law, and does not afford him due process of law. Nor do we think it an answer to this proposition to say that the assessed value was no higher than the true value of the shares in money. No increase in the value of shares already assessed can be *be* made without jurisdiction of the party affected. Section 5848 of the Ohio statutes expressly provides that the illegal levy of taxes and assessments, or either, may be enjoined. Rights conferred by the statute will be enforced in the Federal courts. Cummins *v.* National Bank, 101 U. S. 153; Grether *v.* Wright, 23 C. C. A. 498.

The statute gives the board no jurisdiction to increase the assessment without notice; therefore, the collection of the tax levied as a result of the board's action is illegal, and, under the Ohio statute, can be enjoined. We are of opinion, therefore, that for want of notice to the tax-payer the action of the State board of equalization in increasing the valuation of the shares of complainant for taxation was illegal and void, and the circuit court erred in reaching the opposite conclusion.

As a further ground for reversal it is claimed that the matter in controversy between the parties as to the right of stockholders in the complainant bank to set off indebtedness against their holdings

of stock is *res adjudicata* between the parties, and to establish
540 this proposition the record in the case of The Mercantile National Bank of Cleveland, Ohio, *v.* Whitbeck, is introduced in which a final decree was entered in the circuit court of the United States for the northern district of Ohio, on the 8th day of April, 1887. It is alleged that in that case the question was made as to the right of the stockholders to set off their indebtedness against their stock holdings and was conclusively determined, it having been therein held that the tax laws of Ohio, permitting holders of other moneyed capital to set off their indebtedness was a discrimination against the holders of national bank stock within the meaning of section 5219, Revised Statutes of the United States. Since the decision of the supreme court in the case of Chapman *v.* National Bank, 56 O. S. 310, and the decision of the Supreme Court of the United States in the same case affirming the decision of the supreme court of Ohio—Bank of Wellington *v.* Chapman, 173 U. S. 205—it is settled that the holder of national bank shares, in the absence of proof of discrimination in favor of capital coming into competition with that invested in shares in national banks, has no right to deduct the amount of his *bona fide* debts from such shares, but is legally bound to pay the tax upon the assessed value thereof without deduction on account of such debts. No attack upon this position is made in the argument of this suit in behalf of the appellants, but it is insisted that the matter is *res adjudicata* because of the decision in the suit of appellant against Whitbeck, treasurer. That case is reported in 127 U. S. 193. The bill in the case was based on two grounds—to restrain the treasurer from collecting taxes because bank shares had, in the county of Cuyahoga, by certain means set forth in the bill, been assessed at sixty-five per centum of their value, whereas, other capital of citizens in that county was assessed at sixty per centum of its value. This the Supreme Court held to be unlawful discrimination against the holders of such shares. Upon the question raised here, it is necessary to examine the manner in which it was made and the nature of the decree granting a perpetual injunction. From the record in evidence in the Whitbeck case, we find that the bill avers, among other things:

"Your orator further avers that by section 2730 of the Revised Statutes of Ohio it is enacted that 'the term "credits" shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due to, or to become due to the person liable to pay taxes thereon,
including deposits in banks or with persons in or out of this
541 State, other than such as are held to be money as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money) over and above the sum of legal *bona fide* debts owing by such person;' and by section 2736 of the Revised Statutes of Ohio, it is provided that every person required to list property for taxation shall deliver to the assessor annually a statement of all personal property, money and 'credits' and other property in his possession or under his control on the day

preceding the second Monday of April of that year, which he is required to list for taxation; and by section 2737, it is provided that such statement, among other things, shall truly set forth the amount of 'credits' possessed by such person as that term is by the above-recited statute defined. Your orator says that a large amount of moneyed capital in the hands of individuals invested in promissory notes and other obligations and credits is by the aforesaid provision allowing deduction of legal, *bona fide* debts to be made therefrom, expressly exempted from taxation, thereby making an unjust and unlawful discrimination against moneyed capital invested in national bank shares, as to which no exemption, or deduction, is provided for by the laws of the State, which discrimination is in direct violation of the restrictions of said section 5219 of the Revised Statutes of the United States."

Then follow allegations as to the indebtedness of certain shareholders; the right is claimed to deduct the same from the value of their shares of bank stock. Again in summing up the grounds of relief, complainant says:

"Your orator avers and insists that the taxes so levied and assessed against it on account of its said shares of stock are unjust, illegal and void for the following, among other reasons: 1st. That said tax is levied and assessed against your orator directly and is in violation of the act of Congress under which your orator is incorporated. 2d. That the laws of Ohio authorize and permit the owner of credits to deduct therefrom all debts owing by him and requires him to list for taxation only the excess of credits over his indebtedness, and that such is the uniform practice throughout the State, and that under the laws of the same State the owner of capital stock of your orator is denied the right to deduct therefrom his indebtedness, but is required to list for taxation the whole number of shares owned by him, and not simply the excess over his indebtedness, and your orator insists that such discrimination results in the taxation of your orator's stock at much greater rate than is assessed upon other moneyed capital in the hands of individual citizens of Ohio."

In this statement we find the averment that the owners of credits are permitted to deduct their indebtedness while the owners
542 of bank stock are not thus favored. But the term "credits" as used in this part of the bill must be taken in connection with the allegations of the bill which state the definition given by the statutes of Ohio of the term "credits," which shows such term to include the excess of sums of a limited class of moneyed capital over and above the indebtedness of individuals and not to include moneyed capital in general. Upon this branch of the bill the question presented was whether the deduction permitted for the purpose of taxation of indebtedness from the limited class of capital named in the statute was an unlawful discrimination against the shareholders in national banks within the meaning of the Federal statute. The record shows that the decree making a general finding in favor of complainant in the Whitbeck case was based on the answers made to a certificate of division of opinion in the circuit court, certifying certain questions to the Supreme Court, among others, whether

the taxation of national bank shares in the State of Ohio in 1885, without permitting the shareholders to deduct from the assessed value of his shares the amount of his *bona fide* indebtedness existing on the Wednesday next preceding the second Monday in April, 1885, is a discrimination forbidden by act of Congress, the said shareholders not having deducted said *bona fide* indebtedness from any credits owned by them at either of said dates. Whether the demand for such deduction, first made on the 17th day of December, 1885, was sufficiently early to entitle complainant's shareholders thereto. In this certificate of division of opinion it is also stated that the laws of Ohio make no provision for the deduction of the *bona fide* indebtedness of any shareholder from the shares of his stock, and provide no means by which said deduction can be secured. Upon this certificate of division of opinion Whitbeck *v.* National Bank was decided in the Supreme Court. It was therein held that the increase of valuation of the shares of stock of complainant from sixty per centum to sixty-five per centum was a discrimination such as is forbidden by section 5219 of the Revised Statutes of the United States. In deciding the other proposition the Supreme Court assuming that the Ohio statute regulating assessments for taxation allow an owner of moneyed capital other than shares in a national bank to have a deduction equal to his *bona fide* indebtedness from the amount of the assessment of the value of such moneyed capital, but that no similar provision was made in favor of shares in a national bank, held the owners of such shares are entitled to a similar reduction and that the right to make the demand therefor was not lost because of the delay in making the de-
543 mand until after the process of equalization of the value of the shares for taxation is completed, and the tax duplicate is delivered to the treasurer for collection. The question made in the bill was whether the deduction of indebtedness from a limited class of capital as defined in the Ohio statute was an unlawful discrimination. The proposition decided by the Supreme Court was, assuming the Ohio statute to be different from what the bill declared it to be, and that it provided that moneyed capital, with the single exception of national bank shares, might have such deduction, it afforded an unlawful discrimination against such shareholders within the meaning of the Federal statute. In other words, the Supreme Court decided the question upon an erroneous assumption, not based on the allegations in the bill of complaint or certified in the questions submitted. The general decree in favor of the bank in that case can be supported by the unlawful discrimination in the increased valuation of the shares of the bank. The real question made under the statutes of Ohio, as they in fact existed, was not passed upon by the Supreme Court of the United States in that case. We think we have a right to look to the opinion to ascertain what was decided by the Supreme Court. Closing the same, Mr. Justice Miller says:

"These principles require the affirmance of the decree of the circuit court; and while there will be found in them a sufficient answer to the questions certified by the judges of that court, we do

not think it necessary to make a more specific answer to each of them. The decree is affirmed."

The decree could stand, under the finding, in favor of the bank upon the other proposition. We think the Supreme Court has decided a proposition not made in the bill, and not set forth in the certificate of division of opinion. While it is said in that certificate that the laws of Ohio make no provision for deduction of debts by shareholders of national banks, there is no statement that such holders are the only owners of moneyed capital not entitled to such deduction. In the case of the First National Bank *v.* Chapman, 173 U. S. 219, the Supreme Court say of the Whitbeck case:

"It is stated, however, that this specific question has been otherwise decided in Whitbeck *v.* Bank, 127 U. S. 193. If this were true, we should be guided by and follow that decision. Upon an examination of the case it is seen that the court gave chief attention to the question whether an increase in the value of the shares in national banks made by the State board of equalization, from 60 per cent. of their true value in money, as fixed by the auditor
544 of Cuyahoga county, to 65 per cent., as fixed by the board (other property being valued at only 60 per cent.), amounted to such a discrimination in the taxation of the shareholders of such banks as is forbidden by the Federal statute. It was held it did.

"Coming to the question of the deduction of *bona fide* indebtedness of shareholders, the court assumed that under the statute of Ohio owners of all moneyed capital, other than shares in a national bank, were permitted to deduct their *bona fide* indebtedness from the value of their moneyed capital, but that no provision for a similar deduction was made in regard to the owner of shares in a national bank; and it was held that the owners of such shares were entitled to a deduction of their indebtedness from the assessed value of the shares as in the case of other moneyed capital. The point to which the court chiefly directed its attention related to the question whether a timely demand had been made for such deduction of indebtedness. It was held that it was made in time, for the reason that the court below expressly found that 'the laws of Ohio make no provision for the deduction of the *bona fide* indebtedness of any shareholder from the shares of his stock, and provide no means by which such deduction could be secured.' As a demand at an earlier period would have been useless, the court held it unnecessary.

"An examination of the statute of Ohio in regard to taxation shows that debts can only be deducted from credits, and how much of credits is moneyed capital is unknown. The case is not authority adverse to the principle we now hold.

"For the reasons already stated, we think the judgment in this case should be affirmed."

In view of the foregoing comments on the decision in the Whitbeck case, and the erroneous assumption therein of the character of the Ohio statute, we are not prepared to say that the judgment in that case was *res adjudicata* as to the rights of complainant's stockholders to deduct their debts from their shares of national bank stock.

A different question is presented by the allegations of former adjudication in the bills filed in 1893 and 1894. In those bills it was sought to enjoin the treasurer from collecting taxes upon the shares of complainant bank without permitting deduction for *bona fide* debts, it being averred that by section 2739 of the Revised Statutes of Ohio, it is enacted that the term "credits" "shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable things or for labor or service due or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this State other than such as are held to be money as hereinafter defined, when added together (estimating every such claim or demand at its true
545 value in money), over and above the sum of legal *bona fide* debts owing by such persons."

"The complainant further says that a large amount of moneyed capital in the hands of individual citizens of the State, and of said county of Cuyahoga and State of Ohio, city of Cleveland, invested in promissory notes and other legal obligations, securities, claims and demands, is, by the aforesaid provision allowing a deduction of legal *bona fide* debts to be made therefrom, expressly exempted from taxation, thereby making an unjust and unlawful discrimination against moneyed capital invested in national bank shares, as to which no exemption or deduction is provided for by the laws of the State, which discrimination is in direct violation of the restrictions of section 5219 of the Revised Statutes of the United States, which provides that: 'The taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such State.'"

This is a distinct allegation that this statute works an unlawful discrimination in favor of the holders of credits under the laws of Ohio, in permitting the holders of a class of capital to have a deduction denied to holders of shares in national bank stock. It was further alleged in those bills as follows:

"The complainant further avers heretofore, to wit, at a date prior to the April term of this court, in the year 1887, the complainant brought suit against Horatio N. Whitbeck, as treasurer of said Cuyahoga county, who then held such office, to enjoin the collection of the excessive taxation of shares of said complainant, growing out of the refusal of the taxing officers of said county to allow the deductions of *bona fide* debts of stockholders from the assessed value of said shares, said Whitbeck then representing the same interest, sustaining the same relations and charged with the same duties to the public as does the present defendant; and in said suit this complainant alleged by its bill the refusal by the then auditor of said county to allow a deduction of *bona fide* debts of the shareholders from the value of shares of stock of said complainant, owned in large part by the same stockholders as those above named, and in which action said treasurer of said county, admitting said refusal to allow said deduction, so joined issue as to present the question of the rights of said owners of said shares, to said deduction, in view of the laws of Ohio; and the said laws being the same as the pres-

ent laws of the State, and those under which the taxing officers of said county acted in 1892 and 1893, in making assessments and in refusing deductions to be made of *bona fide* debts of stockholders from the valuation of said shares; and the complainant says that upon the issues so joined, the said court, at its April term, A. D. 1897, held and determined that said
546 shareholders were by law entitled to said deduction of *bona fide* debts from the value of their said shares to an equal amount fixed for taxation; and in said action the court gave judgment perpetually enjoining said treasurer from collecting or attempting to collect any tax or assessment on the valuation of said shares to an amount equal to said debts from which said deduction was sought to be made and disallowed by said auditor, on the ground that said disallowance was a discrimination against money invested in national bank shares, prohibited by the act of Congress; and the complainant alleges that said issue, so determined and adjudged, was between the same parties, involved the same subject-matter and legislation, and the judgment therein given remains wholly unreversed and is still in full force and operation."

The treasurer demurred to this bill, and the demurrer was overruled, the defendant electing to stand by his demurrer, a final decree was given enjoining the tax levied on the amount assessed equaling the shareholders' indebtedness, the allegations of the bill having been found to be true. The bill above quoted from was brought to enjoin the collection of the June taxes for 1893, and a like bill was filed to enjoin the collection of the December tax of the same year. A similar course of procedure was had, and the court found each and every allegation of the bill to be true and entered a decree accordingly.

The learned judge in the circuit court held that the former adjudications depended upon the discriminations of those years sued upon, in view of the taxation levied in each particular year upon bank shares and other capital in this State, and consequently the adjudications were only as to conditions of fact existing in those years, respectively. But these bills made the question as to the effect of the Ohio statute permitting indebtedness to be deducted from credits as the same were defined therein. The attack under those bills was upon the Ohio system of taxation as authorized by section 2730. It was set up that the statute, which was copied in the bill, discriminated against the holders of national bank stock in permitting indebtedness to be deducted from the demands named in the statute, and not against national bank stock. Credits, which are arrived at by permitting the debts to be deducted from certain capital, exist in the State every year. A discrimination as alleged was not based upon the operation of the law for any particular year, but upon the system of taxation applicable to every year. It would make no difference that in some years credits would make a greater volume of taxable property than in others, so far as the allegations of the bill in this respect are concerned. It is true, since the decision in the Chapman case, 173 U. S., 219, it is established that the
547 taxation of national bank shares — in the same manner as

other shares of capital stock in State banks, not giving them the privilege of deducting their indebtedness as is given to a limited class of capital in arriving at taxable credits, in the absence of a showing that such credits constitute so great a portion of the taxable property of the State in capital coming into competition with that invested in national bank shares as to amount to a discrimination against holders of such shares. But the principle of the decision in the Chapman case must not be confused with the right of a person to plead a former adjudication, if the former adjudication has the identical parties and questions determined to make its *res adjudicata*. We have shown what the allegations in respect to the permitted deduction under the Ohio law were in the bills filed in 1893 and 1894. In the present case the bill claims this discrimination in favor of the holders of credits, and is ample to permit proof and finding of facts which would support the allegations of the former bill. In the present case the master expressly finds:

"In the year 1897 a large amount of moneyed capital in the hands of individual citizens of the State, invested in promissory notes and other obligations and credits, was, by section 2730 of the Revised Statutes of Ohio, authorized to be exempted from taxation through the deductions therefrom of legal *bona fide* debts."

We may take judicial notice of the fact that the statute, at the time of the filing of the present bill, and the report of the master upon which the decree was entered, is the same as it was when the former decrees were given upon the bills of 1893 and 1894. Hanley *v.* Donohue, 116 U. S. 1; Gormley *v.* Bunyan, 138 U. S. 623. The United States statute, section 5219, preventing discrimination against holders of shares of national bank stock, is the same now as then, and has remained unchanged.

We find that upon this branch of the case the allegations and findings of the master bring the case within the allegations of the bills of 1893 and 1894. It is true the master finds other facts, from which he states he is unable to reach a conclusion which would show discriminations against national bank stock in favor of the classes of capital which come in competition therewith so as to give the complainant the right to an injunction within the principles laid down in the Chapman case. This does not affect the fact that he
548 makes a finding which fully supports the allegation of the bills filed subsequent to the Whitbeck case, and before the Chapman case was decided. We then have a former adjudication in which it was held, upon this branch of the bill, that the deduction allowed under section 2730, Revised Statutes of Ohio, worked a discrimination against the holders of national bank shares. This being the effect of that adjudication, it is decisive between the parties when applied to subsequent years, the statute remaining the same and the right of the party to the deduction being based upon the same principle, and arising from facts and conditions bringing the case within the right determined in the prior adjudication. This conclusion is supported by the decision of the Supreme Court of the United States in the case of New Orleans *v.* Citizens' Bank, 167 U. S. 371. In that case it was held that the judgment of a court in Lou-

isiana of superior jurisdiction upon the issue, duly raised by the pleadings, whether the bank was exempt by contract with the State from taxes assessed against it for particular years, concluded that question, as between the same parties and their representatives, in respect of taxes assessed against it for subsequent years. The court said:

"The proposition, that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore *res adjudicata* cannot apply, while admitting in form the principle of the things adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties and their privies."

The opinion of Mr. Justice White in that case is a thorough and elaborate discussion of the doctrine under circumstances closely akin to those of the present case.

One ground of relief in the bills of 1893 and 1894 was predicated upon the former adjudication set forth in that respect in the parts above quoted. The demurrer confessed the allegations of the bills. Judgment rendered upon demurrer has been held by the Supreme Court of the United States as decisive as a verdict upon the same facts would be. Facts established by such an adjudication are conclusive between the parties and those in privity with them. Bissell *v.* Spring Valley Township, 124 U. S. 225. It is true that estoppels must
549 be certain, and if the confession of the demurrer left other parts of the bill not available here as a plea of *res adjudicata* which could support the former decree, the estoppel would not be shown. We have seen that the facts pleaded in the former bill as a basis of relief are identical with the facts as found by the master in this case. As to the plea of former adjudication, the bill distinctly alleged that the decree in the Whitbeck case had held the discrimination made by the Ohio statute to be unlawful within the statute of the United States, and that it had been adjudicated therein that national bank shareholders were entitled to deduct their debts from the value of their shares for the purposes of taxation. The treasurer saw fit to stand upon his demurrer. Within the principle established in the Chapman case, he might have made issues which would have produced a different result, but the question now is, Is this former judgment in full force so identical with the present case that the judgment therein is decisive upon the parties here? We think it is. It is said in Biglow on Estoppel, third edition, quoted with approval by Mr. Justice White in New Orleans *v.* Citizens' Bank, *supra*:

"Matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objection, though the judgment may have been erroneous and liable to, and certain of, reversal in a higher court."

We, therefore, cannot escape the conclusion that the former adjudications in the cases of 1893 and 1894 are conclusive between

the parties, notwithstanding the subsequent decision of the Supreme Court in the Chapman case. In reaching a contrary conclusion, we think the master, as well as the circuit court, erred. The judgment will be reversed and the cause remanded with instructions to enter a decree in favor of complainant in accordance with the views herein expressed.

550 UNITED STATES OF AMERICA, } ss:
*Sixth Judicial Circuit,* }

United States Circuit Court of Appeals for the Sixth Circuit.

To Mercantile National Bank of Cleveland, Ohio, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington D. C. *in* 23d day of January next, pursuant to an appeal, fil*l*ed in the clerk's office of the U. S. circuit court of appeals for the sixth circuit, wherein M. A. Lander as successor of R. S. Hubbard as treasurer of Cuyahoga county Ohio is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 13th day of December, in the year of our Lord one thousand nine hundred, and of the Independence of the United States of America the one hundred and twenty-fifth.

H. F. SEVERENS,
*Circuit Judge.*

551 *Marshal's Return.*

THE UNITED STATES OF AMERICA, } ss:
*Northern District of Ohio,* }

Received this writ at Cleveland Dec. 21, 1900, and on same day, at same place, I served the same by delivering a true and certified copy hereof and all endorsements thereon to the within-named Mercantile National Bank of Cleveland, Ohio, by handing a copy to C. L. Murfey, cashier of the above-named bank.

F. M. CHANDLER,
*U. S. Marshal,*
By F. M. FANNING, *Deputy.*

*Fees.*

| | |
|---|---|
| Service | $2.00 |
| Mileage | .06 |
| Copying citation | .30 |
| | $2.36 |

552 United States Circuit Court of Appeals for the Sixth Circuit.

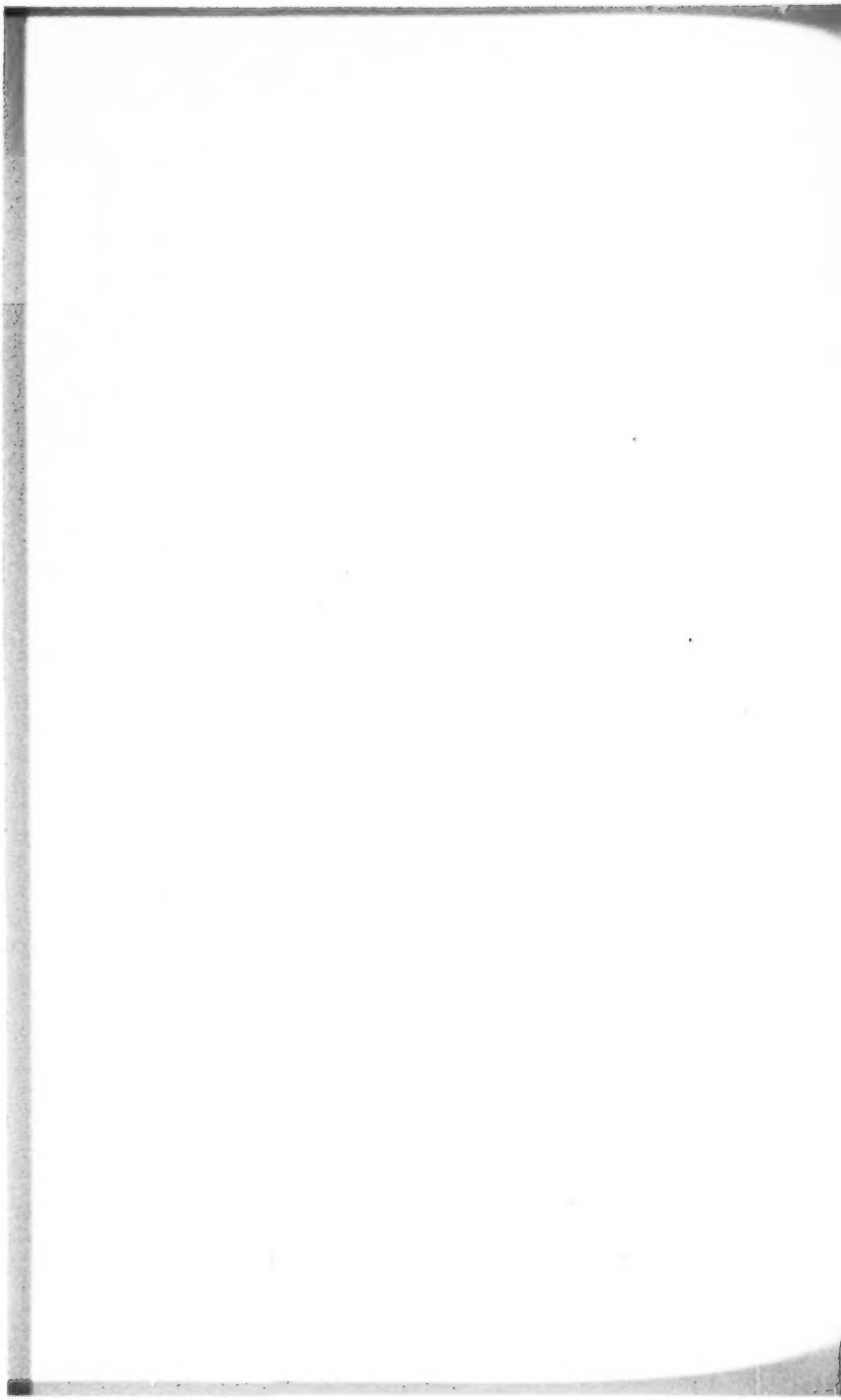
I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record & the original citation in the case of The Mercantile National Bank of Cleveland *vs.* R. S. Hubbard as treasurer of Cuyahoga county No. 817, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the city of Cincinnati, Ohio, this 28th day of December, A. D. 1900.

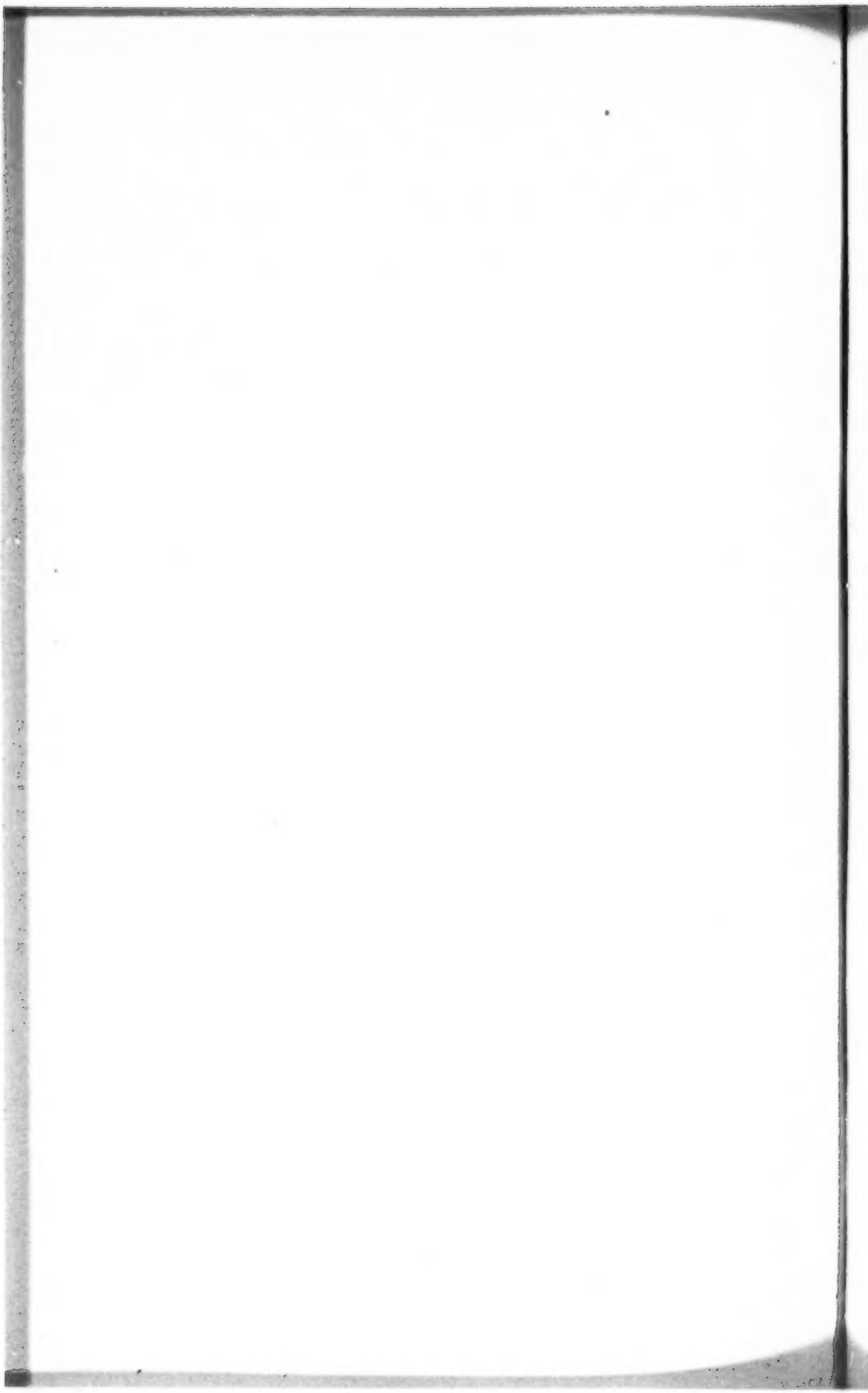
FRANK O. LOVELAND,
*Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.*

Endorsed on cover: File No. 18,019. U. S. C. C. of appeals, sixth circuit. Term No. 227. Marcellus A. Lander as treasurer of Cuyahoga county, Ohio, appellant, *vs.* The Mercantile National Bank of Cleveland, Ohio. Filed January 12th, 1901.



# INDEX.

History of case ..... 3-6
Question of discrimination against bank shares in Ohio, discussed ..... 6-26
Findings of fact as bearing upon question of discrimination examined ..... 26-37
Discussion of question of notice to Appellee ..... 37-46
The tax assessed is no greater than ought to have been assessed ..... 46-50
The claim of *res judicata* discussed ..... 50-66
Constitution of Ohio; Sections bearing on taxation ..... 7
Statutes of Ohio; Sections bearing on taxation ..... 7-17



# Supreme Court of the United States.

**No. 227.**

---

MARCELLUS A. LANDER, AS TREASURER OF CUYAHOGA COUNTY, OHIO,

APPELLANT,

vs.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,

APPELLEE.

---

## BRIEF OF APPELLANT.

---

### HISTORY OF CASE.

This is an action in equity begun by The Mercantile National Bank of Cleveland, Ohio, filing its bill of complaint, (Rec. p. 3) in the Circuit Court of the United States, Northern District of Ohio, Eastern Division, in which it sought to enjoin the County Treasurer of Cuyahoga county, Ohio, from collecting taxes assessed for the year 1897 against the holders of the shares of its capital stock, on the ground that the taxes thus assessed violate Section 5219 Revised Statutes of the United States. The bill further averred that the auditor of Cuyahoga county, assessed the total ten thousand shares, which were of the par value of $100.00 each, in the complainant bank, at $519,320.00; that the State Board

of Equalization for Banks increased this valuation to $642,320.00; that the increase was made without notice to the complainant bank, and without giving it an opportunity to be present; that the increase by the State Board of Equalization was from sixty per cent. to seventy-four per cent. of the true value of the shares of stock; that the assessed value of other moneyed capital in the hands of citizens of Cuyahoga county, and the City of Cleveland, does not exceed sixty per cent. of its true value; that the State Board knowingly and designedly made this discrimination against the complainant.

The bill further sets out the substance of Section 2730, Revised Statutes of Ohio, defining "credits," and alleging, that by said section permitting individual citizens to deduct their *bona fide* debts from such "credits," and not permitting the owners and holders of national bank shares so to do it works a discrimination against such owners. Avers that at least $200,000,000 of credits were exempted by this provision; that the shares of building and loan associations created under the laws of Ohio, are, by law, to be considered as "credits," and held as such; that thereby $70,000,000 was by statute exempted from taxation.

The bill further avers that a number of share holders in the complainant bank owe debts which have not been deducted from the value of their shares, and that the evidence of such debts had been tendered to the county auditor. The averments of the bill are that $123,000 should be deducted from the assessment of the State Board of Equalization, upon which taxes to the amount of $3,726.90 have been assessed; and that there should be deducted from said assessment, also, the amount of the indebtedness of the individual stockholders of the bank, the tax on which amounts to $3524.78. The complainant avers that it has tendered the amount due, less the sum in dispute, and prays for an injunction restraining the treasurer from collecting the additional amount.

The complainant further pleads a former adjudication between the complainant and Horatio N. Whitbeck, the predecessor of the defendant as Treasurer of Cuyahoga county, in which it was ad-

judged, as between the parties, that the system of the deduction of debts from credits, under the Statute of Ohio, was a discrimination against the complainant bank, in violation of Section 5219 of the Revised Statutes of the United States.

The defendant filed an answer (Rec. p. 17) and an amendment to answer (Rec. p. 28) presenting an issue upon the fact of notice to the complainant of the hearing before the State Board of Equalization; an issue upon the averments as to the discrimination arising from the operation of the Statute of Ohio, in allowing debts to be deducted from credits; and an issue denying the effect claimed for the former adjudication between the complainant and the predecessor in office of the defendant.

The appointment of a special examiner was made (Rec. p. 23), to take the testimony. After the taking of the testimony, a Special Master was appointed to examine the cause and to make a special finding of fact, and to report the same with his conclusion of law thereon, to the court. (Rec. p. 24.)

The Special Master made his report, (Rec. pp. 34-70 inclusive). To this report the bank filed an exception (Rec. p. 420), and the treasurer filed certain exceptions (Rec. p. 423).

The exceptions of both parties were argued before Hon. William H. Taft, United States Circuit Judge, December 23, 1899; the opinion of the court rendered thereon being found on pages 429 to 438 of the Record. The decree rendered by that court sustained the exceptions filed by the treasurer and dismissed the complainant's bill at its cost.

Appeal was taken by the Bank to the United States Circuit Court of Appeals for the Sixth Circuit, where the cause was argued, and decision rendered December 10, 1900, reversing the judgment of the Circuit Court, remanding the cause to the Circuit Court, with instructions to enter the decree in favor of Complainant. For the opinion of the Circuit Court of Appeals, see Record, pp. 449 to 462 inclusive.

From the decree of that court, the successor in office of the former county treasurer prosecutes his appeal to this court, seek-

ing the reversal of the judgment and decree of the Circuit Court of Appeals.

## ARGUMENT.

Among the assignment of errors made by the Appellant, special reliance is placed upon the following propositions:

I.

**The court erred in holding that the allowance, by the laws of Ohio, of various exemptions from taxation of moneyed capital in the hands of individual citizens of Ohio, as set forth in the Complainant's bill of complaint, result in and make an unjust and unlawful discrimination against moneyed capital invested in National Bank Shares, so as to violate Section 5219 of the Revised Statutes of the United States.**

II.

**The court erred in holding, that the former adjudication between the Complainant and the Treasurer of Cuyahoga County, Ohio, in 1887, 1893 and 1894, as shown by the record, was conclusive of the right of the shareholders of the Complainant Bank to deduct their bona fide indebtedness from the value of their shares for purposes of taxation; and was conclusive against the Treasurer in contesting such claim of right.**

The proposition first above stated, has been before this court in several cases, which we will cite hereafter. We consider it as fully sustained by the authorities. The proposition has been held by this court to require a construction of the operation of the State Constitution and Statute Law, upon the subject of taxation, with that of the provisions of Section 5219, Revised Statutes of the United States. Each must be viewed in the light of the operation of the other, because, every exemption from taxation under the Constitution and Laws of Ohio, does not amount to a "discrimination" under Section 5219, Revised Statutes of the United States. As the right of the Complainant to recover is based upon an alleged violation of that section, and of rights guaranteed by the

Constitution of Ohio, we set forth *in extenso* the sections of the Constitution applicable herein, and of the statutes enacted pursuant thereto as they existed at the time in question.

OHIO CONSTITUTION:

*Section 2, Article 12.*

"Laws shall be passed, taxing by uniform rule, all moneys, credits, investment in bonds, stocks, joint stock companies or otherwise; and also all real and personal property according to its true value in money; but burying grounds, public school houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusive'y for any public purpose, and personal property to an amount not exceeding in value two hundred dollars, for each individual, may by general laws, be exempted from taxation; but, all such laws shall be subject to alteration or repeal; and the value of all property so exempted, shall from time to time, be ascertained and published as may be directed by law."

OHIO CONSTITUTION:

*Section 3, Article 12, Constitution.*

"The General Assembly shall provide by law, for taxing notes and bills discounted or purchased, moneys loaned, and all other property, effects or dues, of every description, (without deduction) of all banks; now existing, or hereafter created, and of all bankers, so that all property employed in banking, shall always bear a burden of taxation equal to that imposed upon the property of individuals."

OHIO CONSTITUTION:

*Section 4, Article 13, Constitution.*

"The property of corporations, now existing or hereafter created, shall forever be subject to taxation, the same as the property of individuals."

*Revised Statutes of Ohio, Section 2730.*

"In this title the terms "real property" and "land" shall be held to mean and include not only land itself, whether laid out in town lots or otherwise, with all things contained therein, but also, unless otherwise specified, all buildings, structures and improve-

ments; and fixtures of whatever kind thereon, and all rights and privileges belonging, or in any wise appertaining thereto;

The terms "investments in bonds" shall be held to mean and include all moneys in bonds, or certificates of indebtedness, or other evidence of indebtedness of whatever kind, whether issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, states, or other incorporations, or by the United States, held by persons residing in this state, whether for themselves or others;

The terms "investments in stocks" shall be held to mean and include all moneys invested in the capital or stock of any association, corporation, joint stock company or other company, the capital or stock of which is or may be divided into shares, which are transferable by each owner without the consent of the other partners or stockholders, for the taxation of which no special provision is made by law, held by persons residing in this state, either for themselves or others;

The terms "personal property" shall be held to mean and include first, every tangible thing, being the subject of ownership, whether animate or inanimate, other than money, and not forming a part of any parcel of real property, as hereinbefore defined; second, the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion, or interest in such stock, profits or means, by whatsoever name the same may be designated, inclusive of every share or portion, right or interest, either legal or equitable, in and to every ship, vessel, or boat of whatsoever name or description, used, or designed to be used, either exclusively or partially, in navigating any of the waters within or bordering on this state whether such ship, vessel or boat shall be within the jurisdiction of this state, or elsewhere, and whether the same shall have been enrolled, registered, or licensed at any collector's office or within any collection district in this state or not; third, the money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for the same, if between the parties the same is considered as security merely;

The term "money" or "moneys," shall be held to mean and include any surplus or undivided profit held by societies for savings, or banks having no capital stock, gold and silver coin, bank notes

of solvent banks in actual possession, and every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw in money on demand;

The term "credits" shall be held to mean the excess of the sum of all legal claims and demands whether for money or other valuable thing, or for labor or service due, or to become due, to the person liable to pay taxes thereon, including deposits, in banks, or with persons in or out of this state, other than such as are held to be money, as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money) over and above the sum of legal bona fide debts owing by such person; but in making up the sum of such debts owing there shall be taken into account no obligation to any mutual insurance company, nor any unpaid subscription to the capital stock of any joint stock company, nor any subscription for any religious, scientific, literary, or charitable purpose; nor any acknowledgment of any indebtedness unless founded on some consideration actually received and believed at the time of making such acknowledgment to be a full consideration therefor, nor any acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation; nor any greater amount or portion of any liability as surety, than the person required to make the statement of such credits believes that such surety is in equity bound and will be compelled to pay, or to contribute, in case there be no securities; provided, that pensions receivable from the United States shall not be held to be credits; and no person shall be required to take into account in making up the amount of credits a greater portion of any credits than he believes will be received or can be collected, or any greater portion of any obligation given to secure the payment of rent than the amount that shall have accrued on any lease, and remain unpaid; words importing the masculine gender shall apply to females also, and the word "person" or party," or other word importing the singular number, shall be held to include firms, companies, associations, and corporations; and all words in the plural number shall apply to single individuals also in all cases in which the spirit and intent may require it."

*Revised Statutes of Ohio, Section 2731.*

"All property whether real or personal in this state, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks or otherwise, of persons re-

siding in this state, shall be subject to taxation except only such as may be expressly exempted therefrom; and such property, moneys, credits, and investments, shall be entered on the list of taxable property as prescribed in this title; all tracts of land, set apart for school or ministerial purposes and sold by and under authority of law, and all lands which shall be hereafter sold by the United States, shall be subject to taxation as other lands in this state immediately after such sale; but school or ministerial lands shall not be sold for taxes until the purchase money therefor shall be fully paid but shall be returned as delinquent and continue on the duplicate, with the taxes of each year charged thereon and added to the tax and penalty due when the same became delinquent, until payment be made by the purchaser or his assigns, of such purchase money with the tax and penalty or the lands resold by the county auditor, pursuant to the laws now or hereafter in force for the sale of such lands."

*Revised Statutes of Ohio, Section 2732.*

"The following property shall be exempt from taxation:

First: All public schoolhouses, and houses used exclusively for public worship, the books and furniture therein, and the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of the same, and not leased or otherwise used with a view to profit; all public colleges, public academies, all buildings connected with the same, and all lands connected with public institutions of learning, not used with a view to profit. This provision shall not extend to leasehold estates of real property held under the authority of any college or university of learning in this state. Provided, nevertheless, that all leaseholds, or other estates or property whatsoever, real or personal, the rents, issues, profits and income of which have been, or hereafter shall be given to any city, town, village, school district or sub-district in this state, exclusively for the use, endowment or support of schools for the free education of youth without charge, are and shall be exempt from taxation so long as such property, or the rents, issues, profits and income thereof shall be used and applied exclusively for the support of free education by such city, town, village, district or sub-district."

Second: "All lands used exclusively as graveyards, or grounds for burying the dead, except such as are held by any person, persons, company or corporation, with a view to profit, or for the purpose of speculating in the sale thereof.

Third: "All property, whether real or personal, belonging exclusively to the State or United States.

Fourth: "All buildings belonging to counties, used for holding courts, for jails or for county offices, with the ground, not exceeding, in any county, ten acres, on which such buildings are erected.

Fifth: "All lands, houses and other buildings belonging to any county, township or town, used exclusively for the accommodation or support of the poor.

Sixth: "All buildings belonging to institution(s) of purely public charity, and all buildings belonging to and used exclusively for armory purposes by lawfully organized military organizations which are and shall continue to be fully armed and equipped at their own expense and by law made subject to all calls of the governor for troops in case of war, riot, insurrection or invasion together with the road (land) actually occupied by such institutions, and that owned and used as sites for such armory buildings of said military organizations not leased or otherwise used with a view to profit, and all moneys and credits appropriated solely to sustain and belonging exclusively to said institutions and military organizations.

Seventh: "All fire-engines and other implements used to (for) the extinguishment of fires, with buildings used exclusively for the safe-keeping thereof, and for the meeting of fire companies, whether belonging to any town or to any fire company organized therein.

Eighth: "All market-houses, public squares, or other public grounds, town or township houses or halls, used exclusively for public purposes, or erected by taxation for public purposes notwithstanding some parts thereof may be leased under and by virtue of Section 2566 of the Revised Statutes of Ohio, and all works, machinery, pipe-lines and fixtures belonging to any town and used exclusively for conveying water to such town, or for heating or lighting the same, and any unpaid taxes assessed against any property comprised in this sub-division, with any penalty thereon, is hereby remitted.

Ninth: "Each individual residing in this state may deduct a sum not exceeding one hundred dollars as exempt from taxation, from the aggregate listed value of his taxable personal property of any kind of which such individual is the actual owner, except dogs,

Tenth: "All funds raised and set apart for the purpose of building monuments to the fallen soldiers of this state, and all monuments and monumental buildings, when erected shall be forever exempt from taxation for any purpose whatever."

*Revised Statutes of Ohio, Section 2736.*

"Each person required to list property shall, annually, upon receiving a blank for that purpose from the assessor, or within five days thereafter, make out and deliver to the assessor a statement, verified by his oath, as required by law, of all the personal property, moneys, credits, investments in bonds, stocks, joint stock companies, annuities, or otherwise, in his possession, or under his control, on the day preceding the second Monday of April of that year, which he is required by law to list for taxation, either as owner or holder thereof, or as parent, husband, guardian, trustee, executor, administrator, receiver, accounting officer, partner, agent, factor, or otherwise; and also all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, held on said day by another, residing in or out of this state, for, and belonging to the person so listing, or anyone residing in this state, for whom he is required by law to list, and not listed by such holder thereof, for taxation in this state."

*Revised Statutes of Ohio, Section 2737.*

Such statement shall truly and distinctly set forth, first, the number of horses, and the value thereof; second, the number of neat cattle, and the value thereof; third, the number of mules and asses, and the value thereof; fourth, the number of sheep, and the value thereof; fifth, the number of hogs, and the value thereof; sixth, the number of pleasure carrigaes of whatever kind, and the value thereof; seventh, the total value of all articles of personal property, not included in the preceding or succeeding classes; eighth, the number of watches and value thereof; ninth, the number of piano fortes and organs, and the value thereof; tenth, the average value of the goods and merchandise, which such person is required to list as a merchant; eleventh, the value of the property which such person is required to list as a banker, broker, or stock-jobber; twelfth, the

average value of the materials and manufactured articles which such person is required to list as a manufacturer; thirteenth, moneys on hand or on deposit subject to order; fourteenth, the amount of credits as hereinbefore defined; fifteenth, the amount of all moneys invested in bonds, stocks, joint stock companies, annuities, or otherwise; sixteenth, the monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into bonds or other securities of the United States, or of this state, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April; and any indebtedness created in the purchase of such bonds or securities shall not be deducted from the credits under the fourteenth item of this section; but the person making such statement may exhibit to the assessor the property covered by the first nine items of this section, and allow the assessor to affix the value thereof, and in such case the oath of the person making the statement shall be in that regard only that he has fully exhibited the property covered by said nine items.

*Revised Statutes of Ohio, Section 2739.*

"In listing personal property, it shall be valued at the usual selling price thereof, at the time of listing, and at the place where the same may then be; and if there be no usual selling price known to the persons whose duty it is to fix a value thereon, then at such price as it is believed could be obtained therefor, in money, at such time and place; investments in bonds, stocks, joint stock companies, or otherwise, shall be valued at the true value thereof in money; money, whether in possession or on deposit shall be entered in the statement at the full amount thereof, except that depreciated circulating notes shall be entered at their current value; every credit for a sum certain payable either in money, property of any kind, labor or service, shall be valued at the full amount of the sum so payable, except that if it be for a specific article, or for a specified number or quantity of any article or articles of property, or for a certain amount of labor or service of any kind, it shall be valued at the current price of such property or of such labor or service, at the place where payable; and annuities,

or monies receivable at stated periods, shall be valued at the sum which the person listing the same believes them to be worth in money at the time of listing."

*Revised Statutes of Ohio, Section 2758.*

UNINCORPORATED BANKS.

"Every company, association, or person, not incorporated under any law of this state, or of the United States for banking purposes, who shall keep an office or other place of business and engage in the business of lending money, receiving money on deposit, buying and selling bullion, bills of exchange, notes, bonds, stocks, or other evidences of indebtedness, with a view to profit shall be deemed a bank, banker, or bankers, within the meaning of this chapter."

*Revised Statutes of Ohio, Section 2759.*

"All unincorporated banks and bankers shall annually, between the first and second Mondays of May, make out and return to the auditor of the proper county, under oath of the owner or principal officer or manager thereof, a statement setting forth:

First: The average amount of notes and bills receivable discounted or purchased in the course of business by such unincorporated banks, banker or bankers, and considered good and collectable.

Second: The average amount of accounts receivable.

Third: The average amount of cash and cash items in possession or in transit.

Fourth: The average amount of all kinds of stocks, bonds, including the United States government bonds, or evidences of indebtedness held as an investment, or in any way representing assets.

Fifth: The amount of real estate at its assessed value.

Sixth: The average amount of all deposits.

Seventh: The average amount of accounts payable, exclusive of current deposit accounts.

Eighth: The average amount of United Stated government and other securities that are exempt from taxation.

Ninth: The true value in money of all furniture and other property not otherwise herein enumerated.

From the aggregate sum in the first five items above enumerated, the said auditor shall deduct the aggregate sum of the fifth, sixth, seventh, and such portions of the eighth as are by law exempt from taxation, and the remainder thus obtained added to the amount of item nine, shall be entered on the duplicate of the county in the name of such bank, banker or bankers, *and taxes thereon shall be assessed and paid the same as provided for other personal property assessed and taxed in the same city, ward or township.*

*Revised Statutes of Ohio, Section 2759a.*

"The said bank, banker or bankers shall, at the same time, make statement under oath, of the amount and capital paid in or employed in such banking business, together with the number of shares or proportional interest each share holder or partner has in such association or partnership."

*Revised Statutes of Ohio, Section 2759b.*

"That the provisions of Section 2759 shall apply to and govern savings banks incorporated under the act of April 16, 1867."

*Revised Statutes of Ohio, Section 2760.*

"The averages provided for in the preceding section shall be obtained by adding together the amounts of each item above specified, owned by or standing on the books of such bank, banker or bankers, on the first Monday of each month of the year preceding the Monday in May in which the return is made, and dividing the same by the number of months in the year; provided, that in cases where such bank, banker or bankers commenced business during the preceding year, the division shall be made by the number of months elapsed after the commencement of such business."

*Revised Statutes of Ohio, Section 2761.*

"When any person, persons, company or association unincorporated, shall commence or engage in the business of banking, after the day preceding the second Monday in April, in any year, the average value of whose personal property intended to be employed in such business shall not have been previously entered on the assessor's list for taxation, in said county, such person, per-

sons, company, or association shall report to the auditor of the county the probable average value of the personal property by him or them intended to be employed in such business until the day preceding the second Monday in April thereafter, and shall pay into the treasury of such county a sum which shall bear the same proportion to the levy for all purposes, on the average value so employed, as the time from the day on which he or they shall commence or engage in such business as aforesaid, to the day preceding the second Monday in April next succeeding, shall bear to one year."

*Revised Statutes of Ohio, Section 2762.*

"All the shares of the stockholders in any incorporated bank or banking association, located in this state, whether now or hereafter incorporated or organized under the laws of this state or of the United States, shall be listed at their true value in money, and taxed in the city, ward, or village where such bank is located and not elsewhere."

*Revised Statutes of Ohio, Section 2763.*

"Real estate of any such bank or banking association shall be taxed in the place where the same may be located, the same as the real estate of individuals."

*Revised Statutes of Ohio, Section 2764.*

"There shall at all times be kept in the office where the business of such bank or banking association is transacted, a full and correct list of the names and residences of the stockholders therein, and the number of shares held by each, which shall be at all times during business hours open to the inspection of all officers who are or may be authorized to list or assess the value of such shares for taxation."

*Revised Statutes of Ohio, Section 2765.*

"The cashier of each incorporated bank shall make out and return to the auditor of the county in which it is located, between the first and second Monday of May, annually, a report in duplicate, under oath, exhibiting, in detail, and under appropriate heads, the resources and liabilities of such bank, at the close of business on the Wednesday next preceding said second Monday, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and the par value of each share."

*Revised Statutes of Ohio, Section 2766.*

"Upon receiving such report the county auditor shall fix the total value of the shares of such banks according to their true value in money and deduct from the aggregate sum so found the value of the real estate included in the statement of resources as the same stands on the duplicate, and thereupon he shall make out and transmit to the annual state board of equalization for incorporated banks a copy of the report so made by the cashier, together with the valuation of such shares as so fixed by the auditor."

*Revised Statutes of Ohio, Section 2769.*

"If any bank shall fail to make out and furnish to the county auditor the statement required, within the time herein fixed, it shall be the duty of said auditor to examine the books of said bank; also, to examine any officer or agent thereof under oath, together with such other persons as he may deem proper, and make out the statement. Any bank officer failing to make out and furnish to the county auditor the statement, or willfully making a false statement, as required in Section 2765, shall be liable to a fine not exceeding $100, together with costs and other expenses incurred by the auditor or other proper officer in obtaining such statement aforesaid; and said auditor shall have the same powers, and the probate judge of the county sha'l exercise the same powers, and perform the same duties in aid of the auditor in the performance of his duties under this section, as are authorized by law in cases where the county auditor is informed, or has reason to believe, that any party has failed to make any return, or has made a false return for taxation; and the statement so made out by the auditor shall in all respects stand as the statement required to be made by the cashier."

The complainant in the court below relied upon the above quoted sections of the Constitution of the State of Ohio, and the sections of the Statutes of Ohio, in attempting to make out his claim for equitable relief in that court. It sets forth at length in paragraph six of its bill of complaint, Section 2 of Article 12, Section 3 of Article 12, and Section 4 of Article 13 of the Constitution of Ohio, and says that those sections have been violated

by the conduct and actions of the various assessing and taxing officers which listed complainant's bank shares for taxation.

In paragraph seven of its bill of complaint, Section 2730 of the Revised Statutes is plead in effect, also Sections 2736 and 2737.

In paragraph eight the complainant avers.

"That a large amount of moneyed capital in the hands of individual citizens of the State of Ohio invested in promissory notes and other legal obligations, securities, claims and demands amounting to several hundred million dollars, is by the aforesaid sections allowed a deduction of legal bona fide debts to be made therefrom, and that the same are expressly exempted from taxation."

By the reading of said sections of complainant's bill of complaint the pertinence of an examination into the construction made by the Supreme Court of Ohio and the Supreme Court of the United States of said several sections of the Constitution and of the statute is made apparent.

One of the earliest cases in Ohio construing the foregoing sections was the case of the Exchange Bank of Columbus vs. Hines, 3 O. S., 1. This involved incidentally the question above stated.

On the thirteenth day of April, 1852, the Legislature of Ohio passed a law for the taxation of personal property, including moneys and credits, which is found on page 135 of the laws of Ohio for the year 1852, and also on page 901 of Swan's Statutes of 1854. The 10th Section of that act provided that in making up the amount of "moneys and credits" a person might deduct from the gross amount of "moneys and credits" the amount of his bona fide debts, etc. In the case cited the constitutionality of this section was attacked. The claim made by counsel, who asserted the unconstitutionality of the act, was that it permitted a person to deduct the amount of his bona fide debts from his *moneys and credits* and, while it was argued that debts cannot be deducted from *moneys and credits*, yet the stress of the argument, to show that the law was unconstitutional, was laid upon that por-

tion of the section which permitted the deduction of debts from *moneys*. The court held that section of the law unconstitutional in the following language (Syllabus):

"The tenth section of the law which allows individuals and certain corporations, in giving their tax lists, to deduct their liabilities from the amount of their *moneys and credits* is repugnant to the Constitution of Ohio and is void."

"The Constitution permits no deduction of liabilities from *moneys and credits*."

By that decision the deduction of bona fide debts was denied. The question came up later in the case of Latimer vs. Morgan, 6 O. S., 280, and in that decision the principle announced in the case of Exchange Bank of Columbus vs. Hines was approved and followed in the following language:

"The decision in the case of the Exchange Bank of Columbus vs. Hines, 3 O. S., 1, giving a construction to the second and third sections of the 12th Article of the Constitution and declaring unconstitutional and void the 10th section of the tax law of April 13, 1852, is approved and followed."

Section 10 of said law being inoperative by reason of the decision in the above cases, the Legislature of Ohio passed an act on the first day of April, 1856, which act is found on page 52 of volume 53 of the Ohio Laws, therein is found a statutory definition for the term "credits," and further an enumeration of the obligations that may be exempted from taxation by deducting the same from "credits" as therein defined; but the court will observe that the deduction of legal bona fide debts was not to be made from "moneys and credits" but from "credits" alone, and those only of a certain class; also that the debts to be deducted are of a certain class and do not include debts generally. This plainly raised a different proposition than the one that was presented in the case of Bank vs. Hines and Lattimer vs. Morgan, supra, and the Supreme Court of Ohio in passing upon this amendatory act in the case of Payne vs. Watterson, 37 O. S., 121, said:

"Under Title 13 of the Revised Statutes relating to taxation, a person required to list property is not authorized to deduct his

debts from his *investments in bonds* as therein defined and to return the excess only for taxation."

That case presented the question whether debts could be deducted from "investments in bonds" of certain corporations then held and owned by the plaintiff in error.

In passing upon that question the court decided that "investment in bonds" were not "credits" and therefore a deduction on account of debts could not be made from "investments in bonds," and they again affirmed the decision in the case of Bank vs. Hines.

This statute of April 1, 1856, defining the meaning of the word "credits" was re-enacted in substantially the same words in the laws of 1854, page 173, Section 1; also in the laws of 1875, page 437; and again in the laws of 1876, page 29, and now forms Section 2730 of the Revised Statutes of Ohio above quoted.

This question was again presented to the Supreme Court of Ohio in the case of Treasurer vs. Bank, 47 O. S., 503. In that case the question was presented of the right of an unincorporated bank to deduct its debts from "its cash and cash items," and arose upon the plea of the unconstitutionality of Subdivision 3 of Section 2759 of the Revised Statutes of Ohio. The Supreme Court of Ohio in deciding that case said:

"A deduction under Section 2759 of the average amount of all debts and the average amount of accounts payable, exclusive of current deposit accounts, from the average amount of notes and bills receivable, discounted or purchased in the course of business, by such incorporated bank or bankers, and considered good and collectible, would not be in conflict with either of the above named sections of the Constitution; but the same deduction from the average *amount of cash and cash items* in possession would contravene Section 2 of Article 12 of the Constitution. * * *

"The average amount of all debts, and all accounts payable, returned by the defendant in the sixth and seventh items of its statement, should therefore be deducted from the average amount of all its notes and bills receivable discounted or purchased.

"But this deduction should not be made from the average *amount of cash and cash items* in possession; money or cash, for the most part, is regarded and treated as property in possession, hav-

ing intrinsic value and not the mere evidence of claims upon others. As property in hand of a tangible nature, distinctive in itself, and determinable as to value without the uncertainty of mere choses in action, it cannot be reduced or diminished on the tax duplicate by deducting from it the liabilities of the owner—whether individual or corporation—without an infringement of the constitutional requirement that *all* property shall be taxed by a uniform rule. And that portion of Section 2759 of the Revised Statutes, which directs the auditor to make the enumerated deductions, so far as it includes any aggregate from which the deductions are to be made, of the average *amount of cash and cash items* in possession, is, in our view, repugnant to the Constitution and void, but it is not otherwise objectionable on constitutional grounds."

"And furthermore the elimination of the right to make deduction from the average amount of cash and cash items in possession, would only leave the bank on a footing of that equality *with individuals contemplated in the Constitution*—clothed with the right of deducting the sum of its legal bona fide debts, from the amount of its claims and demands; and of being taxed on the excess as credits."

Therein, the court will notice the question at issue was whether a bank or an individual could deduct his bona fide debts, from what is denominated "cash and cash items;" and the court held that in so far as the Statute of Ohio permitted that to be done it was unconstitutional.

The next case following on this question decided by said court is the case of Niles vs. Shaw, 50 O. S., 370. *This case we contend is the first authoritative expression by the Supreme Court of Ohio of the identical question that is raised in this case.* In all the other cases that have preceded Niles vs. Shaw in the State of Ohio, other propositions were linked with the question of the right to deduct debts from credits—and in considering it special stress was laid upon other phases of the question presented, more than upon the question of deduction of some *debts* from some *credits*.

In Niles vs. Shaw, supra, the court decided:

"Our laws do not authorize the deduction from the value of

shares in a national bank entered on the duplicate for taxation, of legal bona fide debts owing by the holder of such shares of stock." Within that decision will be found the classification made by the Supreme Court of Ohio assigning shares of stock in a national bank to that subdivision of Section 2730 known as "investments in stocks." Shares in national banks are held by the court to be investments in stocks and not credits, and not being credits they are not permitted to be reduced in amount by the deduction of bona fide debts therefrom, for the reason that under our statute bona fide debts can only be deducted from "credits" and not from "investments in stocks."

The decision of Niles vs. Shaw was followed by the case of Chapman, Treasurer of Lorain County, vs. First National Bank of Wellington, in 56 O. S., 310. There the Supreme Court of Ohio in an extensive and able opinion again reconsidered all the cases above cited upon this question, and held:

"In the administration of our tax laws, the holder of national bank shares has no right under the statute, state and national, to deduct his legal bona fide debts from the value of such shares, but he is legally bound to pay taxes upon the assessed value of such shares without deduction on account of such debts. Niles vs. Shaw, 50 O. S., 370, followed and approved.

From the judgment of the Supreme Court of Ohio, the plaintiff in error, the First National Bank of Wellington, prosecuted error to the Supreme Court of the United States. The court handed down its decision on February 27, 1899; sustaining the Supreme Court of Ohio on every proposition announced by them. 173 U. S., 205. On the proposition of the deduction of all debts from the value of bank shares, and of what this court had heretofore held on that question, this court therein said:

* * * *

"*It is stated, however, that this specific question has been otherwise decided in Whitbeck vs. Mercantile Bank of Cleveland* (127 U. S., 193). *If this were true, we should be guided by and follow that decision.* Upon examination of the case it is seen that the court gave chief attention to the question whether an increase in the

value of the shares in national banks made by the State Board of Equalization from sixty per cent. of their true value in money, as fixed by the auditor of Cuyahoga county, to sixty-five per cent., as fixed by the board (other property being valued at sixty per cent.), amounted to such a discrimination in the taxation of the shareholders of such banks as is forbidden by the Federal statute. It was held that it did.

"Coming to the question of the deduction of the bona fide indebtedness of shareholders, *the court assumed that under the statute of Ohio owners of all moneyed capital other than shares in a national bank were permitted to deduct their bona fide indebtedness from the value of their moneyed capital*, but that no provision for a similar deduction was made in regard to the owner of shares in a national bank, and it was held that the owners of such shares were entitled to a deduction of their indebtedness from the assessed value of the shares as in the case of other moneyed capital. *The point to which the court chiefly directed its attention related to the question whether a timely demand had been made for such deduction of indebtedness.* It was held that it was made in time, for the reason that the court below expressly found that "the laws of Ohio make no provision for the deduction of the bona fide indebtedness of any shareholder from the shares of his stock, and provide no means by which such deduction could be secured." As a demand at an earlier period would have been useless, the court held it unnecessary.

An examination of the statutes of Ohio in regard to taxation shows that *debts can only be deducted from credits;* and how much of credits is moneyed capital is unknown. *The case is not authority adverse to the principle we now hold.*

For the reasons already stated, we think the judgment in this *case should be affirmed.*"

Judge Taft, upon this proposition in the case at bar said:

> "The general result of the evidence is no more satisfactory as showing what amount of discrimination, if any, there is by reason of this definition of credits in the Ohio Statute of tax-

> ation than it was in National Bank of Wellington vs. Chapman, *supra*. For this reason I must conclude, as the Master did, that the averments of the bill as to the discrimination arising upon the operation of this definition of credits against moneyed capital is not such as to justify any action by the court in complainant's favor."

This array of State and Federal authorities settle beyond controversy, the proposition that a holder of shares in a National bank *has not the right to deduct his legal bona fide debts from the value of his shares for purposes of taxation.*

The complainant bank on this question takes refuge behind the decision of the United States Supreme Court in the case of Whitbeck vs. Mercantile National Bank of Cleveland (127 U. S., 193), and assert that that decision is an authority in their favor, and against the position of the State herein. The State contends that the Whitbeck case is denied to be an authority on the question by the Supreme Court of the United States, in the recent decision of First National Bank of Wellington vs. Chapman, supra, for in that case the court said:

> *"If this be true we should be guided by and follow that decision."*

The Whitbeck case is not an authority on the question at issue, but the same is controlled by the decision in the First National Bank vs. Chapman, supra; Bank vs. Ayres (160 U. S., 660); Aberdeen Bank vs. Chehallis Co. (166 U. S., 440), and Bank of Commerce vs. Seattle (and three other cases therein cited), 166 U. S., 463.

Another reason urged by us in our brief in the case of First National Bank of Wellington vs. Chapman, Treasurer (and seemingly adopted by the Supreme Court of the United States), why the Whitbeck case should have no controlling influence in the determination of this question, was that at the time of the rendition of the judgment by the Federal Supreme Court in the Whitbeck case, there had been no decision by the Supreme Court of Ohio upon the express question.

This is made apparent by an examination of the dates of the decisions.

The Whitbeck case (127 U. S., 193) was decided April 23, 1888. The *first decision of the Supreme Court of Ohio* on the right of shareholders in national banks to deduct their *bona fide* debts from the amount of their shares, was that of Niles vs. Shaw, 50 O. S., 370, decided May 9, 1893. In which decision bank shares were first classified under Sections 2730 and 2731 of the Revised Statutes of Ohio, as "investments in stocks," and not as "credits." That was a construction of our state taxing statute by the Supreme Court of our state.

The Supreme Court of the United States will follow the decision of the highest court of a state in the construction of its statutes. If the State Supreme Court has announced no decision on the construction of a state statute, the Federal Supreme Court, in the absence of such construction, will give to the state statute a construction of its own; but if the Supreme Court of the state *afterwards announces a contrary construction such construction will be followed by the Federal Court.*

That is exactly what has been done upon this question.

Upon this question the authorities are so numerous we will not weary the court with their citation, except the following which seems directly in point.

In the First National Bank of Garnett vs. Ayres, 160 U. S., 660, it is held that:

"By the decision of the Supreme Court of Kansas, Section 6847, of the General Statutes of that state, defining the word "credit," as used in the chapter providing for the assessment and collection of taxes, was held not to include shares of stock in a national or state bank, and the owners of such shares were held to have no right under that statute to deduct from the assessed value of their shares the amount of their debts. *This court is bound by the interpretation given to the Kansas statute by the Supreme Court of that state.* (New York vs. Weaver, 100 U. S., 539, 541.)"

"The construction placed by the Supreme Court of the state on

the Indiana act of March 6, 1891, that the railroad companies are given the right to be present and to be heard before the State Board of Tax Commissioners, is conclusive upon this court."

P. C. & St. L. R. Co. vs. Becker, 154 U. S., 421-427.

## II.

**An examination of the findings of fact as bearing upon the question of discrimination against bank shares.**

The treasurer claims that, as a legal proposition, the bank has failed to show the right of its shareholders to deduct their debts from the value thereof for purposes of taxation. In that portion of the bill it certainly has failed. We, therefore, next examine the finding of fact, to see if, from the facts found, the judgment of the Circuit Court of Appeals should be sustained. We contend that neither, as a proposition of law or fact, was there any discrimination shown against the shares of national banks.

In the fifth paragraph of complainants' bill of complaint it avers (Record, p. 6):

> "The complainant avers that the assessed valuation of its shares so fixed by the State Board of Equalization and so entered on the tax duplicate of Cuyahoga county against its said shareholders was over seventy-four per cent. of the true value of the money, property and assets so as aforesaid thereby covered; that all other personal property, including moneys on deposit, promissory notes and amounts due and receivable, are and have been for many years assessed for taxation by the taxing officers of the State of Ohio at a rate of not exceeding 60 per cent. of their face or apparent value; that the valuation so as aforesaid fixed by said auditor of Cuyahoga county on this plaintiff's shares of stock was fixed at 60 per cent. of the true value thereof, and that such assessment was in conformity with his uniform practice and the uniform practice of the taxing officers of said county and other counties in the State of Ohio on all classes of investments. The plaintiff further avers that said Board of Equalization knowingly and designedly did fix a much higher percentum of valuation and assessment for taxation upon the shares of the plaintiff's capital stock than was assessed upon other moneyed capital in the hands of individual citizens of the State of Ohio, and much higher than that fixed on other moneyed capital in the hands of such citizens in said county of Cuyahoga and said city of Cleveland."

Admitting even, for sake of the argument, that "all of the personal property, moneys on deposit, etc.," were, and for many years had been, assessed by the taxing officers of Ohio at a rate not exceeding 60 per cent. of their value, yet the *complainant bank and its shareholders, at the same time, escaped with being assessed on less than sixty per cent. of the value of their shares, as the facts found show.*

We admit the propriety of the application of the rule, so frequently announced, that

> "In considering a special finding of facts, a Federal Appellate Tribunal can only consider whether the facts found in law support the judgment, and cannot examine the evidence to ascertain whether a finding of facts be thereby justified."
>
> Jenks, Administrator, vs. Stapp, 9 U. S. A., 34.

And in this inquiry limit ourselves to the finding of fact.

In the latter part of the seventeenth finding made by the Master (Record, p. 42), he found that moneyed capital in the hands of individual citizens in Cuyahoga county was assessed for taxation in 1897, as nearly as practicable, at 60 per cent. of its value. He further found, as shown by paragraph 19 of this report (Record, p. 42), that the actual cash value of the shares of stock in complainant's bank was $128.00 per share; and in paragraph 3 (Record, p. 35), that the capital stock of complainant's bank was divided into 10,000 shares; and that therefore the actual cash value as found by the Master was $1,280,000.00.

That pursuant to Section 2760, Revised Statutes of Ohio, there should be deducted from the actual value of the shares, the value of the real estate as the same stands on the duplicate, which the Master finds in the fifth paragraph (Record, p. 35), and in the nineteenth paragraph (Record, p. 42), to amount to $117,370.00, which being deducted from the actual cash value of such shares leaves $1,162,630.00 *as the true value* after deducting the value of the real estate. That computing 60 per cent. upon said amount, the amount at which other property was estimated, it would fix the value upon which taxes should have been computed at $697,578.00,

*while the Board of Equalization fixed the value of the shares, for taxable purposes, at only $642,320.00* (8th paragraph, Record, p. 37).

It will thus be seen that the amount of the taxable value of complainant's shares, as compared with their actual value, *was but slightly in excess of fifty-five per cent.*, and therefore no discrimination against complainant's shares was caused by the action of the board, and none existed in favor of any other moneyed capital.

The finding of fact further sustains the valuation as fixed by the Board of Equalization upon complainant's shares, and far in excess thereof, by showing that at the time the cashier of complainant bank made the report of the resources and liabilities thereof, and for six months prior and six months subsequent thereto, such bank sustained no losses; and during all that time made net earnings sufficient out of which to pay a dividend semi-annually of three per cent. on all of its shares, and carried forward at each of said semi-annual periods, to the credit of its shares, net profits varying in amount from $84,000.00 to $99,000.00 (Record, pp. 39 and 40; paragraphs 14, 15 and 16).

The claim of the bank made in argument in the court below, why its return for taxation differed so materially in amount from its return to the Comptroller of the Currency, made at the same time, was, that the bank had sustained some losses which made their valuation materially lower. If it was so claimed, there was no proof to sustain it, and the finding of the Master is directly the contrary, that no losses were sustained, and the actual value, per share, was $128.00. Can this discrepancy between the one return and the other be explained away on the hypothesis of losses sustained by complainant? We claim not.

Section 5204, Revised Statutes United States, reads as follows:

"Section 5204. No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. *If losses have at any time been sustained by any such association, equal to or exceeding its undivided*

*profits then on hand, no dividend shall be made;* and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its *net profits* then on hand, *deducting therefrom its losses and bad debts.* All debts due to any associations, on which interest is past due and unpaid for a period of six months, unless the same are well secured, and in process of collection, shall be *considered bad debts* within the meaning of this section. But nothing in this section shall prevent the reduction of the capital stock of the association under section fifty-one hundred and forty-three."

It will be noticed that if losses have at any time been sustained by a national bank equal to or exceeding its undivided profits on hand, no dividend shall be made, and no dividend shall ever be made by any such bank while it continues its banking operations to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts.

The statute goes further and says, all debts due to any association on which interest is past due and unpaid for a period of six months, unless the same are well secured and in process of collection, shall be considered bad debts within the meaning of this section. The reports of the dividends made to the Comptroller of the Currency are required to contain the loss sustained through bad debts, decrease of values, etc. There cannot be any concealment of bad debts from the Comptroller of the Currency, and then use the same to reduce the taxable valuation of bank shares, but if the "bad debts" exist, by which to reduce the taxable valuation of shares, they must appear in the report made to the Comptroller of the Currency, also in the form provided under Section 5204, R. S. U. S., as well as in the declaration of dividends, as testified to.

By Section 5211, R. S. U. S., the report made to the Comptroller shall be verified by the oath or affirmation of the president or cashier, and attested by the signature of at least three of the directors.

By Section 5212, R. S. U. S., the report of the declaration of dividend must be attested by the oath of the president or cashier of the association.

The proof thereby provided for rises to as high a plane as the affidavit made by the cashier under Section 2765, R. S. of Ohio.

So that, to accept the one as evidence and not the other, when the affidavits are made by the *same officers*, at the *same time*, with regard to the *resources and liabilities* of the *same bank*, would be to set aside all rules of evidence, and conclude the taxing officers of the state, in their endeavors to increase complainant's return.

The manner of the taxation of bank shares is left to the individual states. The constitutional rule of Ohio, of requiring all property to be listed at its true value in money, would and does apply to bank shares. The procedure of listing the same at *a given per cent. of its par value*, if they are so listed, is without statutory or constitutional foundation, and has received no support from the courts, but we here accord to bank shares the same privileges accorded to other moneyed capital, and say it was fair to such investments to return them at 60 per cent. of their true value, but in this case it did not amount to 50 per cent.

In the case of Hepburn vs. The School Directors, 90 U. S., 480, it was held that national bank shares may be valued for taxation at an amount *above their par value*.

In the case of People vs. The Commissioners of Taxes and Assessments, 94 U. S., 415, the U. S. Supreme Court held:

"The shares of stock of a national bank in New York should be assessed for taxation at their actual value."

Ex rel. Williams vs. Albany Board of Assessors, 2 Hun., 583.

People ex rel. Bank vs. New York City, 8 Hun., 536; 94 U. S., 415.

The case above cited (94 U. S., 415) seems to correspond with the case at bar in so many particulars that a statement of the facts might not be out of place.

"The Gallatin National Bank of the City of New York had a capital of $1,500,000.00, divided into 30,000 shares of $50.00 each. It had reserved from profits $300,000.00; it also held on deposit with the treasurer, bonds of the United States of the par value of $591,-

000.00 on which the premium would be $118,200.00; so that the bank had in addition to its capital, $418,200.00. The Commissioners of Taxes and Assessments in the City of New York had signified their intention of taxing this surplus, and the president of the bank made a statement of its condition. Its capital and surplus were thus shown to be $1,918,200.00, which on a division would make each share $63.63. As the bonds were liable to fluctuation and might slightly exceed the estimate, he made affidavit that the value of each share did not exceed $64.00. Thereupon the commissioners deducted $5.00 per share as the proportion of the assessed value of the bank's real estate, and took $59.00 as a valuation of each share and imposed the tax accordingly. The relator to test the authority of such assessment sued out of the Supreme Court of the state a writ of certiorari, which upon hearing was quashed. It thereupon appealed to the court of appeals where the judgment below was affirmed, and then brought the case to the Supreme Court of the United States.

The court said on page 416:

"The laws of the state of New York provide that shares of stock like those we refer to shall be assessed 'on the value' of the shares, and at 'their full and true value, as they (the assessors) would appraise the same in payment of a just debt due from a solvent debtor,' deducting the proportional value of the real estate owned by the bank." (Citing the New York Statutes.)

"The assessors were justified, under this authority, in fixing the value as we have stated. The appraisement *included the reserve fund, which is as much a part of the property of the bank, and goes to fix the value of shares, equally as if it were not called by that name, but remained as part of the specie, bills discounted, or other funds of the bank, undistinguished from the general mass.*"

"The forty-first section of the act of Congress of June, 1864, provides that the states may tax the shares of national banks, subject to two restrictions: 1st, That this taxation shall not be 'at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state;' and, 2nd, That the taxes so imposed shall not exceed the rate imposed upon the shares of any of the

banks organized under the authority of the state where such association is located. 13 Statute, 112. In Hepburn vs. School Directors, this court decided that, in making assessment of bank shares by this authority, it was competent to assess them at an amount above their par value."

"The surplus fund which a national bank is required to reserve from its net profit is not to be excluded in the valuation of its shares for taxation."

Stafford Nat. Bank. vs. Dover, 58 N. H., 316.
National Bank vs. Newark, 39 N. J. L., 380.

"To include all reserve funds, profits, earnings, and other values."

Bank vs. Papin, 4 Dill., 29.
Bank vs. Covington, 21 Fed. Rep., 489.

Applying the reasoning of the court to the complainant bank, the court will find that in fixing the valuation of the shares of complainant bank *its surplus and undivided profits were not taken into consideration in fixing their value.*

*If they had been taken into consideration, the shares instead of being fixed at fifty-five and sixty per cent., would be fixed at about $128.00 per share.*

The fact then being plainly before the court of the value of the shares of the complainant bank, it seems to us that the sole question for the court to decide, would be, could the Board of Equalization list said shares at as high a rate as they have done, or even above their par value?

The cases above cited decide that question in the affirmative beyond any dispute.

On the above question see also the case of Stanley vs. Supervisors of Albany, 121 U. S., 435 to 552.

People vs. Assessors of Albany City, 9 Hun., 583 to 591.

We think that it has been conclusively shown by the evidence that there is no discrimination against the shares of said complainant bank, and that the same have been beyond doubt listed far below their true value in money. It might be pertinent to cite here some

authorities upon the proposition as to what exemptions allowed to other forms of capital would not be considered a discrimination under Section 5219, R. S. U. S. Basing this proposition upon the statement made by complainant in its bill, that they have been discriminated against because certain capital invested in building and loan associations, and certain capital invested in savings banks, and certain other forms of capital, are each allowed a deduction of debts from credits, which in the opinion of the complainant amounts to a discrimination.

In the case of Hepburn vs. School Directors, 23 Wallace, 480, and Adams vs. Nashville, 95 U. S., 19, it was held: That the exemptions of all mortgages, judgments, recognizances and moneys owing upon articles of agreement for sale of real estate except for state purposes, did not constitute an unlawful discrimination as against national bank shares.

In the case of People vs. Commissioners, 4 Wallace, 244, a similar question was presented, and the court said:

"The meaning and intent of the law-makers were that the rate of taxation of the shares should be the same, or not greater than upon moneyed capital of the individual citizens which is subject or liable to taxation; that is, no greater proportion or percentage of taxes on the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of citizens. And it was said that it was known as sound policy within every well regulated and enlightened state and government, that certain descriptions of property, and also certain institutions—such as churches, hospitals, academies, seminaries and the like—are exempt from taxation; but these exemptions have never been regarded as disturbing the rates of taxation, even where the fundamental law had declared they should be uniform."

In the case of Lionberger vs. Rouse, 9 Wallace, 468, the question was presented, that, as the state of Missouri, had by a special charter exempted two banks from taxation, that that constituted a discrimination as against the shares of the Third National Bank of St. Louis, the complainant in the action. The court, speaking through Mr. Justice Davis, denied this proposition, and among other things said:

"Without pursuing the subject further, it is enough to say that in our opinion Congress meant no more by the limitation in the National Bank Act, than to require of each state, as a condition to the exercise of the power to tax the shares in national banks, that it should as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation."

In the recent case decided by the Supreme Court of the United States, of the First National Bank of Wellington vs. R. S. Chapman, Treasurer of Lorain County (*Supra*) this court held, *that the banks organized by virtue of the statutes of the State of Ohio were treated in exactly the same manner as regards taxation as were the national banks, and there found that no discrimination existed.*

In the case of Bells Gap R. R. vs. Pennsylvania, 134 U. S., 232 to 237, the question was raised in behalf of citizens of other states, as to the validity of a law of the state of Pennsylvania, which imposed a tax upon the nominal or face value of corporation bonds, instead of a tax upon their actual value; and while it was not a case of taxation of national bank stock, some observations were made by Mr. Justice Bradley in expressing the views of the court, that are applicable to the case before us.

After holding that the various states may impose different specific taxes upon different trades and professions, and may vary the rate upon various products, and may tax real estate and personal property in a different manner, and may tax visible property only and may not tax securities for the payment of money, that it may allow deductions for indebtedness or not allow them, the court then summarized the whole matter by saying:

"We think we are safe in saying that the fourteenth amendment was not intended to compel the state to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supercede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material, but it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries, and the discouragement of intemper-

ance and vice, and which every state, in one form or another, deems it expedient to adopt."

In the State of Ohio the policy of the law has been to encourage small investors and small savings by the organization of building and loan associations. The amounts invested in building and loan associations, although alleged by the complainant to constitute a material discrimination against the shares of national banks, cannot be so construed, because it has been held that that class of investments, being similar to amounts invested in savings banks, do not constitute a discrimination against national banks shares.

Taft, J., in his opinion, says:

> "It seems to me that building associations are certainly not to be differentiated in their purpose or object or practical effect from savings banks."

In the case of the Mercantile Bank vs. New York, 121 U. S., 138, the court said (quoting from that decision as cited in 166 U. S., 460):

> "*As to savings banks* it was held that, though it could not be denied that their deposits constituted moneyed capital in the hands of individuals, yet it was clear *that they were not within the meaning of the act of Congress in such a sense, as to require, that, if they are exempted from taxation*, shares of stock in national banks must also be exempted; that it was part of the policy of the state to encourage the accumulations of small savings belonging to the industrious and thrifty, and it was within the reasonable exercise of the power of the state to exempt particular kinds of property, and the conclusion of the court, in respect to savings banks, was thus expressed: 'The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exceptions should be founded on just reason, and not operate as an unfriendly discrimination against investments in national bank shares. However large, therefore, may be the amount of moneyed capital in the hands of individuals, in the shape of deposits in such savings banks as now organized, which the policy of the state exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens otherwise subject to taxation."

It will be found by an examination of the facts in the last cited

case, that there was property exempt from taxation in the state of New York in excess of $1,800,000,000.00, *and yet the court held that the exemption of that property did not constitute a discrimination against national bank shares, for the reason that at best it was only a partial exemption, and a partial exemption did not constitute a discrimination.*

As regards that portion of paragraph five of complainant's bill of complaint, wherein it is averred that it was the uniform practice of the taxing officers *of counties in the State of Ohio, other than Cuyahoga county,* to assess all classes of investments at 60 per cent. of their true value. We contend that the necessity of considering that question is eliminated by a stipulation made by counsel.

After taking certain depositions on November 14, 1898, by the complainant bank, a stipulation was made and entered into, which is referred to in paragraph 18, of the Finding of Facts (Record, p. 42), as follows:

> "By stipulation signed by the parties to said cause it was agreed that if the court holds it competent to put in proof of taxation of moneyed capital and bank shares, outside of Cuyahoga county, that there is no discrimination for counties outside of the county of Cuyahoga in the State of Ohio, by taxing officers of said counties in fixing the valuations for the purposes of taxation upon moneyed capital as against shares in incorporated banks."

It, therefore, confines the question of alleged discrimination against bank shares to the actual practice of the taxing officers of Cuyahoga county, and upon that question we contend, that instead of there being any discrimination against bank shares in that county, the proof and finding of the Master shows that such investments were favored at least five per cent. above all other moneyed capital.

Of course, the Master did find (17th paragraph, Record, p. 41) that the valuation placed upon the shares of complainant bank was much higher than that paid on other moneyed capital in Cuyahoga county, and constituted an unjust discrimination against complainant. But when that finding is examined, in the light of his other findings, especially paragraph 19, Record, p. 42, it will be

found that the claim of discrimination is not supported; and we are of the opinion, that as between such finding of the Master and the opinion of Taft, J., thereon, (Record, p. 436, top), the reasoning of the court is the better sustained; for to use the court's language,

> "It seems to me that the findings of the Master upon this point, therefore, are inconsistent; and the exception to them must be sustained."

## III.

**As to the question of notice to complainant bank of the action of the State Board of Equalization.**

If the complainant bank had not the right to have its share holders' debts deducted from the value of their bank shares before returning the same for taxation, but the auditor of Cuyahoga county had so permitted them to be deducted; when the State Board of Equalization for bank shares added to the banks' returns a part of the debts, so illegally deducted, and did not give *actual* notice to the bank, it fully complied with the law. The absence of *actual* notice, under such circumstances cannot entitle it to any equitable relief, and proposes merely an academic question whose solution can have no material bearing upon the merits of the cause. As the Circuit Court said:

> "In that view it becomes unimportant to decide, as already stated, whether or not the notice of the action by the State Board of Equalization was sufficient."

But lest this court might take a different view of the question, we contend, that the notice given to the bank by the statute of the time of meeting of the board and its proceedings, is all the notice required.

A resume of the Statutes of Ohio bearing upon the question of the procedure necessary to be observed to list and equalize bank shares follows:

Section 2762, R. S. of Ohio, provides that all the shares of the stockholders in any incorporated bank shall be listed at their true value in money, and taxed in the city, ward, or village where such bank is located, and not elsewhere.

Section 2765 provides that the cashier shall make out and return to the county auditor, between the first and second Monday of May, a return, exhibiting in detail and under appropriate heads, the resources and liabilities of such bank at the close of business on the Wednesday next preceding the second Monday of May, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and the par value of each share.

Section 2766 provides that, upon receiving such report the county auditor shall fix the total value of the shares of such bank according to the true value in money, and from the aggregate make a deduction for the value of the real estate, as it stands on the duplicate, and thereupon he shall make out and transmit to the annual State Board of Equalization of Incorporated Banks, a copy of the report so made by the cashier, together with the value of such shares so fixed by him as auditor.

Section 2808 provides that the governor, auditor of state and attorney general shall constitute a Board of Equalization of the Shares of Incorporated Banks, and for this purpose they shall meet on the third Tuesday of June, annually, at the office of the auditor of state, and examine the returns of said banks to the county auditors and the value of said shares as fixed by the county auditors, as the same shall have been reported by the county auditors to the state auditor.

Section 2809 defines the powers of this board and says that they shall hear complaints and equalize the value of said shares according to the rules prescribed by this title for valuing and equalizing the values of real and personal property, and in addition to this power the board has the right to raise the aggregate value of the shares, subject to the limitation that they shall not increase or reduce the grand aggregate value of bank shares by more than 20 percentum.

Section 2810 provides that the auditor of state shall, forthwith after such equalization shall have been made, certify the valuations to the auditors of the proper counties and that the same shall be put upon the tax list.

It being proven by the evidence that the members of the State Board of Equalization of Bank Shares met at the *proper place*, to wit, at the office of the auditor of state, and at the *proper time*, that is, on the third Tuesday of June. There is contained in said petition no averment that this plaintiff was at the *proper place* at the *proper time*, to make any complaint relative to the valuation as fixed upon its shares, but on the contrary the evidence shows the parties were not there.

In order to get a correct understanding of the powers and duties of the State Board for the Equalization of the Shares of Incorporated Banks, it is interesting and absolutely necessary that we examine the history of this legislation.

For many years, while it was provided that banks should make a return to the county auditor, still, there was no provision for equalizing the values of said shares, and it was not until April 12, 1876, (73 O. L., 251), that this board was created. Since that time the board has been composed of the same officers, their place of meeting has been the same, that is, at the office of the auditor of state, and the time for meeting has been at the same time, to wit, on the third Tuesday of June, except a period of three years from 1880 to 1883, during which time the State Board of Equalization had the power to equalize the value of the shares of incorporated banks. But on March 9, 1883, the original sections as they now appear, providing for the annual State Board of Equalization for Incorporated Banks, were enacted.

(1) *Our contention is that no other notice was required, or was necessary beyond the statutory notice, fixing the time and place of the meeting of this board.* While a great deal may be said about due process of law and the necessity of notice, still, we contend that in such proceedings no other notice was required than the one given by statute.

In the case of Glennet et al. Exrs. vs. Raine, Auditor (30 Bull., 30), speaking of the authority of Boards of Equalization, Judge Hunt says:

"No provisions of the law exist requiring the board to notify the owner that it is about to take such action. The law itself is notice that the board is charged with that duty, and will perform it. The fact of the erection of new structures by the plaintiff, and the duty imposed by the law on the board to review the valuation of the assessors at the regular meeting, is all the notice the law deems necessary in the matter."

In a decision rendered in 1851, Judge Spalding, in the case of Hambleton vs. Dempsey, 20 O., 168, on page 173, says:

"It is objected that the taxpayer had no notice of the action of the board, and that it nowhere appears affirmatively, that they acted upon evidence of an undervaluation of the property. The law fixes the time of meeting and the place, to wit, the second Monday in April, annually, and at the auditor's office. This is notice to every citizen who has property, real or personal, returned for taxation."

This case is one of the earliest expressions of our Supreme Court upon the authority of the Board of Equalization, and has never been overruled or even distinguished or criticized in any decision since that time.

In this case the plaintiff had made a return for taxation and had notice of the place of meeting as well as the time of meeting of the State Board, and nowhere is it averred in the petition that he sought in any way to object to the estimate, or to make any complaint or to furnish any additional information to the board beyond what was contained in the original return as made to the county auditor.

Desty on Taxation, page 599, says:

"All parties are bound to take notice of the day of the meeting of the commission, when the day is appointed by law; and under the general notice, parties must attend the meetings as they would the session of a court until their estimate is passed upon, and when once this is done no change can afterwards be made without special notice."

On page 601 the same author says:

"The proceeding being judicial, the law must provide some kind of notice and opportunity to be held before the proceedings become final, or they will want the essential ingredient of due process of law. It may be given by personal citation, *or by statute; it is usually given by statute* prescribing a time and place where parties may be heard."

In Wagoner vs. Loomis (37 O. S., 571), on page 582, Judge McIlvaine says:

> "Our statutes have made ample provision for the correction of mistakes and errors of judgment, committed by those intrusted, in the first instance, with the fixing of values upon taxable property. Even unjust and corrupt discrimination can be relieved against, in the special tribunals provided by the statute, for the equalization of values. As a general rule, the decisions of these boards must be held to be final and conclusive."

Black on Tax Titles, Section 131, says:

> "As we have just stated, notice to the taxpayer is a constitutional requisite before the assessment is final and definitely made a charge upon him, but if the statute does not expressly require a personal notice to be given, it becomes a question what kind or degree of notice will be sufficient to satisfy the constitutional requirement of due process of law."

The author instances Nebraska and California as requiring actual notice, and then states:

> *"But in all other states, as far as we have been able to discover, the doctrine prevails that if a public statute, of which all persons are bound to take notice, sufficiently states the day and place when the Board of Equalization meets, and persons affected by their action cannot complain that such action was taken without notice to him."*

In Adler vs. Whitbeck (44 O. S., 573), the court says, that

> "When the party has a chance to be heard before the officer appointed to make the assessment and return, he cannot be heard to say that he has been injured in his property, without due process of law, because no mode of appeal is provided."

In the case of Hager vs. Reclamation District 108 (111 U. S., 701), on page 710, the court says:

> "The officers, in estimating the value of property act judicially; and in most of the states provisions are made for the correction of errors committed by them through a board of revision or equalization, sitting at designated periods provided by law, to hear complaints, respecting the justice of the assessments. *The law in prescribing the time when such complaints will be heard, gives all the notice required*, and the proceeding by which the valuation is determined, though it may be followed if the tax be not paid, by a sale of the delinquents' property, is due process of law."

In The Merchants' Bank vs. Pennsylvania (167 U. S., 461), on page 466, the court says:

> "The final objection is that there is a lack of due process of law, in that the property of the shareholders is subject to an advalorem tax without an opportunity being given to them to be heard as to the value. *It is true that the statute contemplates no personal notice to the shareholder, but that has never been considered an essential to due process in respect to taxation.* The statute defines the time when the bank shall make its report to the auditor general, and it specifically directs him to hear any stockholder who may desire to be heard. The statute therefore fixes the time and place, for official proceedings are always, in the absence of express provisions to the contrary, to be had at the office of the officer charged with the duties; and a notice to all property holders of the time and place at which the assessment is to be made is all that "due process" requires in respect to the matter of notice in tax proceedings."

In the case of State ex. rel. vs. Jones, Auditor, 51 O. S., 492, the Supreme Court of Ohio said (quoting from pages 514 and 515):

> "The law itself states the time when the board shall meet, and the express company could not ignore the time of meeting. The meetings of the board are not secret, and the company had the right to be present and explain the statement rendered of its property and the value thereof. Indeed without notice from the board, *or by the terms of the law*, the company would have been unable to make the return prescribed by the statute. And of the company's return, it may be said, in the language of the opinion in the Kentucky Railroad Tax Cases, 115 U. S., 321: 'This return, made by the corporation through its officers, is the statement of its own case, in all the particulars that enter into the question of the value of its taxable property and may be verified and fortified by such explanations and proofs as it may see fit to insert.' "

In the case of Palmer vs. McMahon, 133 U. S., p. 660, the court said:

> "Assessors should give all persons taxed an opportunity to be heard; but it is sufficient if the law provides for a Board of Revision, authorized to hear complaints respecting the justice of the assessment, *and prescribes the time during which, and the place where, such complaints may be made.*"

(2) It being conceded that the statutory notice in this case was sufficient notice of the time and place of the meeting of the State

Board for the Equalization of Bank Shares, it is contended that because of some adjournments the board lost its jurisdiction, and that a new notice would be necessary in order that it might proceed and perform the duties required of the board under the section to which we have referred.

The place where the meeting of this board must be held is fixed, and this board can meet at no other place, without notice to those affected. The place where the meetings are held and have been held, is at the office of the auditor of State, and he is a member of that board.

*There is no averment in the petition that this plaintiff was at the place of meeting of this board, or that it made any attempt to attend the meeting held on the third Tuesday of June, or that it ever applied to know to when the adjournments of the board were made.* The office of the auditor of state is a public office, open at all proper times, and there is no averment, nor is it a fact, that this plaintiff, nor any one representing it, ever appeared at the place designated for meeting of this board, at the time prescribed in the statute for the first meeting, and not until the board had finally adjourned, did they appear. We contend that this plaintiff is now estopped by reason of its own default.

In Gager, Treas., vs. Prout et al. (48 O. S., 89), on page 111, the court says:

> "Having had notice of the commencement of the proceeding the law charged them with notice of what thereafter was done, and it became their duty to pay the taxes charged upon the addition as other taxes."

Upon this point of lack of notice, the cases known as the "State Railroad Tax" cases, 92 U. S., quoting from p. 609, is very much in point. In that case the Supreme Court said the statute

> "Requires the proper officers of the railroad companies to furnish to the state auditor a schedule of the various elements already mentioned as necessary in applying the statutory rule of valuation. It is charged that the Board of Equalization increased the estimates of value so reported to the auditor, *without notice to the companies*, and without sufficient evidence that

it ought to be done; *and it is strenuously urge: upon us, that for want of this notice the whole assessment of the property and levy of taxes is void.*

"It is hard to believe that such a proposition can be seriously made. If the increased valuation of property by the board without notice is void, it is also void as to every other owner of property in the state, when the value assessed upon it by the local assessor has been increased by the Board of Equalization. How much tax would thus be rendered void it is impossible to say. The main function of this board is to equalize these assessments over the whole state. If they find that a county has had its property assessed too high in reference to the general standard, they may reduce its valuation; if it has been fixed too low, they may raise it to that standard. When they raise it in any county, they necessarily raise it on the property of every individual who owns any in that county. Must each of these have notice and a separate hearing? If a railroad company is by law entitled to such notice, surely every individual is equally entitled to it. Yet if this be so,the expense of giving notice, the delay of hearing each individual, would render the exercise of the main function of this board impossible. The very moment you come to apply to the individual the right claimed by the corporation in this case, its absurdity is apparent. Nor is there any hardship in the matter. *This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right, or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked.*

"As we do not know on what evidence the board acted in regard to these railroads, or whether they did not act on knowledge which they possessed themselves, and as all valuation of property is more or less matter of opinion, we see no reason why the opinion of this court, or of the Circuit Court, should be better, or should be substituted for that of the board, whose opinion the law has declared to be the one to govern in the matter."

See also Railway Co. vs. Backus, 154 U. S., 421.

As the appellant has heretofore cited in its brief, the case of Kuntz vs. Sumption, 117 Ind., 1; we cite what the Supreme Court of Indiana, in the later case of Hyland, Auditor, vs. The Brazil Block Coal Co., 128 Ind., 340, said of that case:

"If notice is provided, and it is of such a character as to inform the taxpayer that his lists will be revised, and to give

him a reasonable opportunity to be heard, the constitutional requirement is met. We think there was such notice in this case. *The time for the meeting of the board is fixed by law, so that all interested must take notice.* The duties of the board are also fixed by law, so that all are bound to know what those duties are. * * *

"It is evident it could not be ignorant of the fact that its property would be valued and assessed by the Board of Equalization, for a public law made it the duty of the appellee to furnish a statement for consideration by the board, and also made it the duty of the board to make the assessment. The case is entirely unlike that of an individual taxpayer, for he can not know that the board will take any action upon his list, whereas the corporation knows, as matter of law, that the board will act upon its statement, since that is the principal purpose for which the sworn statement is required. *It is manifest that neither the principle decided in Kuntz vs. Sumption, supra, nor the line of reasoning there pursued, is relevant to the question here present.*"

In P., C., C. & St. L. Ry. Co. vs. Backus, Treas., 133 Ind., 626, the Supreme Court of that state, said:

"The law having required the owners of 'railroad track' and 'rolling stock' to file with the auditor of state a schedule of the same and the value thereof, and having made it the duty of the auditor of state to present such schedule to the State Board of Tax Commissioners, *and having fixed a time for the meeting of such board, the owners of such railway property are bound to take notice of the time of the meeting of such board, and are entitled to no other notice.* And the owners of such property, through their written schedules and statement of values, are heard by such board, and to be further heard they must take notice of, and be present at, the sitting of such board, and make a proper showing."

In Newton vs. Roper et al., 150 Ind., 632, the rule was again restated, as follows:

"While notice is essential to the due process of law, it is not essential to the validity of every step in a proceeding, judicial or *quasi* judicial, that special notice be given as each step is to be taken. The assessment and enforcement of taxes must be by methods necessarily summary, and without the detail of judicial tribunals. With reference to the assessment of property for taxation, it has been held that there is due process of law when the law has prescribed the time, the place, and the tribunal when, where, and by which assessments are to be made."

In Cooley on Taxation, pp. 364-365, it is said:

> "It is not customary to provide that the taxpayer shall be heard before the assessment is made, except where a list is called for from him: but a hearing is given afterward, either before the assessors themselves or before some court or board of review."

That is just what is provided for by the Ohio Statutes. The banks, through the cashier, is required by the law to submit a return to the county auditor, and he to submit it to the State Board, and they authorize a hearing before the State Board. As regards notice of the meeting of the State Board before a hearing may be had, the author, in the same section continuing, says:

> "And of the meeting of that court or board the taxpayer must in some manner be informed, either by personal notice * * * which is reasonably certain to reach him, or *which is equivalent, by some general law which fixes the time and place of meeting, and of which he must take notice.* The last is a common method of bringing the assessment to the notice of the taxpayer, and it is perhaps the best of all, because it comes to be generally understood and is remembered."

In Sanford vs. Poe, 69 Fed. Rep., 552-553, this court said:

> "There is no ground for complaint that the assessments were made without due process of law. The complainants had notice of the time and place where the board would meet, and were required to make a sworn return of their property. *The time and place were fixed by the law, and its sessions were not secret.*"

**Second—But, recurring to the other question involved in this branch of the decision, how has the complainant bank been damaged by any lack of notice to it? It has not been overvalued, and if notice had been served upon it, there is no averment made in the bill that the result would have been any different. Will equity require a vain thing to be done?**

Upon this subject the Circuit Court said:

> "This proceeding is a bill in equity to enjoin the collection of the tax, on the ground that it was assessed without due notice to the complainant. If the tax assessed is no greater than ought to have been assessed, then the complainant is not in a position to ask the intervention of a court of equity, because, however irregular the action of the State Board may

> have been if the complainant can't make it clear that, by a hearing upon notice, it would have been entitled to an assessment less than that which was made, the bill must be dismissed."

As it is conclusively shown by the testimony, and incorporated in the nineteenth finding of fact by the Special Master, that the actual value of complainant's shares were at the time in question $128.00 per share, a computation made upon that basis, after deducting the value of the bank's real estate, will show that the complainant's shares are not compelled to bear a greater rate than is other moneyed capital. This being true the tax should not be enjoined. If, as is claimed by the complainant, the Board for the Equalization of the Shares of Incorporated Banks erred in not giving actual notice to the bank, in addition to the statutory notice, it would only be an irregularity or informality in the process of equalization; and if the amount of the valuation as fixed by the board was just in proportion to other moneyed capital, although informal or irregular, no injustice can be said to have been done to the complainant, and it should not be permitted to enjoin the collection of the tax.

We need not cite to this court the numerous decisions of the Supreme Court of the United States which have held that an injunction to restrain the collection of a tax, on the ground of the illegality of the tax, or informality in its assessment, cannot be maintained. Also that irregularities and informalities are no ground for equitable interference. That an injunction will not issue on account of irregularities in the matter of notice of time and place; nor for an error of judgment on the part of officers in fixing valuations. The mere statement to this court without the citation of any authorities is sufficient.

Some special ground for equitable interference must be shown by the pleadings. (11 Wall, 109.) This, we admit, the complainant has attempted to do; and so far as the allegations of the bill of complaint is concerned, we admit that the complainant has brought itself fairly within the rule laid down in Cummings vs. National Bank, 101 U. S., 153, and many subsequent cases.

But the entire failure of proof to support such allegations is noticeable. When we take the report of the Master and the evidence, we plainly see that the amount of the valuation of complainant's shares is at least $50,000.00 too low, as compared with the valuation of other moneyed capital, and complainant, finding this to be true, is compelled to fall back upon the claim of the alleged illegal or informal action of the State Board, and the plea of *res judicata* to sustain it herein.

Is it not true, as said by the Supreme Court of Ohio, in a recent case (58 O. S., 414):

> "The obligation of the citizen to pay his taxes is regarded as a continuing public duty which is discharged only by their payment."

The complainant has tendered portion of its tax, viz., taxes *upon the valuation as made by itself* returned to the auditor of the county. But when the Board of Equalization raised the valuation of the bank, and raised it to somewhere near its true valuation, the excess is resisted by the complainant. Until it is paid, the duty of the bank is not discharged. It has shown no ground for equitable relief, for "to entitle a party to relief in equity it must clearly appear that he ought not to be required to pay the taxes from which relief is sought."

Desty on Taxation, p. 675.
Conway vs. Younkin, 28 Iowa, 298.
Warden et al. vs. Supervisors, etc., 14 Wis., 618.

> "It is no ground for equitable interference, that the rule of taxation followed in the levy and assessment of taxes was not equal and uniform, if the taxes imposed upon plaintiff's property were less than they would have been if the constitutional rule had been pursued."

Miltimore vs. Supervisors, 15 Wis., 9.

In view of the proven facts, how could the Circuit Court have found differently than it did? There were no irregularities or informalities in the action of the taxing or equalizing boards or officers, that deprived the bank of any of its rights; and upon examination of the true value of its shares, we find no injustice was done

it, and no reason can possibly be found why the action of the board should be enjoined.

In South Platte Co. vs. City of Crete, 11 Neb., 347, one of the grounds of complaint against the taxes was that, "the said city council never sat as a Board of Equalization," and that in consequence of not doing so, that "plaintiff had no opportunity to appear and show that said pretended assessment was too high." But the court said the mere "opportunity" to appear and make such showing would have been of no benefit unless the valuation was relatively too high." Injunction was refused; case dismissed.

In McIntyre vs. White Creek & Co., 43 Wis., 620, 626, that court said:

> "The remaining fact which invalidates the proceedings of the Board of Review, requires but a brief consideration. The law of 1871 contains the proviso. "And provided further, that in all cases, if said board shall raise the amount of such assessment on any property, the owner thereof, if a resident of such town, shall be duly notified of such intention in time, that such owner may be heard before such board in relation to the value thereof."
>
> "*If the plaintiff was not so notified (and whether he was or not it is unnecessary to determine) the omission was in no sense jurisdictional.* It did not go to the groundwork of the tax, but was a mere irregularity, unavailable in a Court of Equity to avoid the tax, *unless it worked a substantial injustice to the plaintiff.*"
>
> Marsh vs. Supervisors, 42 Wis., 502.

"But it resulted in no such injustice, for it is a verity in the case that the valuation of the plaintiff's property fixed by the board was not in excess of its actual value, or of its proportionate value compared with the valuations of the other real estate in the town.

It follows that the proceedings of the Board of Review in raising the valuations of plaintiff's property, are valid. Complaint dismissed."

To the same effect as the above are the following:

> Commissioners vs. Armstrong, 91 Ind., 528.
> Durham vs. The Commissioners, 95 Ind., 182.
> Commissioners vs. Graham, 98 Ind., 279.
> Commissioners vs. Nettleton, 22 Minn., 356.

"And certainly, in justice or reason, a party cannot complain that, when he objects to a tax on the ground of some omission or irregularity in matters of form, he is required to show that he was prejudiced."

Winona, etc., Land Co. vs. Minn., 159 U. S., p. 537.

## IV.

**The claim of res judicata.**

In City of New Orleans et al. vs. Citizens' Bank of Louisiana, 167 U. S., 371, the court says:

"A decision that the tax for a certain year is void because the property is exempt is *res judicata* as to the tax of a subsequent year when the *same question* of exemption is presented *on the same facts.*"

The plaintiff invokes the application of this decision to the case at bar, claiming that the same question was decided by the Supreme Court of the United States in the case of Whitbeck vs. Mercantile National Bank of Cleveland, Ohio, 127 U. S., 193.

We concede that if the issues of law and fact in the Whitbeck case were the same as in the case at bar, then the matter adjudicated in the Whitbeck case is *res judicata* as to the case at bar.

People ex rel. Warren et al. vs. Carter et al., 119 N. Y., 557.

A question is *res judicata* when a court having jurisdiction has finally adjudicated upon the merits of the whole controversy.

If the same question is again brought before the court the answer is that that question has been decided.

But if the question is different, if the issues of fact and law are not the same, there is no *res judicata.*

We propose to show that the matter adjudicated in the Whitbeck case differs from the question to be decided in this case.

In the Whitbeck case the court said:

"The auditor of Cuyahoga county, Ohio, fixed the taxable value of shares in a national bank at 60 per cent. of their true value in money, in accordance with the practice adopted for the valuation of other moneyed capital of individuals in the county and state, and transmitted the same to the State Board of Equalization for incorporated banks. The board increased the

valuation to 65 per cent., and this value being certified back to the auditor, was placed by him on the tax list without a corresponding change being made in the valuation of other moneyed capital of individuals. Held, that this was such a discrimination as is forbidden by Sec. 5219 of the Revised Statutes of the United States.

"The statutes of Ohio regulating assessments for taxation *allow an owner of moneyed capital other than shares in a national bank to have a deduction* equal to his bona fide indebtedness made from the amount of the assessment of the value *of such moneyed capital;* but they make no provision for a similar deduction from the assessed value of shares in a national bank, and provide no means by which such a deduction may be obtained. Held:

(1) That the owners of such shares are entitled to have a deduction of their indebtedness made from its assessed value *as in the case of other moneyed capital;* and

(2) That the right to it is not lost by not making a demand for it until the entire process of the appraisement and equalization of the value of the shares for taxation is completed, and the tax duplicate is delivered to the treasurer for collection. The law of Ohio regulating the taxation of shares in national banks considered."

In delivering the opinion of the court, Miller, J., says:

"Another point made by the bill was, that while the statutes of Ohio *permit the taxpayer owning moneyed capital* subject to taxation to make a deduction, from the amount of his bona fide indebtedness, no such provision is made in regard to the indebtedness of any holder of bank stock. The bill sets up as affected by this proposition the names of certain shareholders of the plaintiff bank, who claim that they should be allowed this deduction for their indebtedness upon the taxable value of their bank shares. * * *

"In regard to the deduction of their bona fide indebtedness, claimed on the part of certain owners of shares in the plaintiff bank from the assessment levied upon such shares, the court finds that no demand was made therefor, either by the complainant or by any of its shareholders until the seventeenth day of December, A. D. 1885, a date prior to the commencement of this action, at which time the entire process of the appraisement and equalization of the value of said shares for taxation had been completed, and the tax duplicate for said year had been delivered in accordance with law to the treasurer of said county for the collection of said taxes; but the laws of Ohio make no provisions for the deduction of the bona fide indebtedness of

any shareholder from the shares of his stock and provide no means by which said deduction can be secured.

"Under the decision of Hills vs. Exchange Bank, 105 U. S., 319, we are of opinion that the bank was entitled to relief in the cases of all the shareholders named in the bill (except James A. Barnett, Robert L. Chamberlain and James Parmelee), and that the fact that they did not make an earlier demand for the deduction of their indebtedness from the assessed value of the shares of their bank stock does not defeat their right to have it made by this bill in chancery, for the reason that the court expressly finds that the laws of Ohio make no provision for the deduction of the bona fide indebtedness of any shareholder from the shares of his stock and provide no means by which said deduction can be secured."

Whether the court was mistaken as a matter of fact in reciting the statutes, and upon such mistake formulated the rule laid down in that case, as set forth in the second syllabus, or whether the court had before it a statute reading in all respects as stated in the opinion, in either view of the case that decision would not apply to the case at bar as *res judicata*, for the reason that it did not fall within the rule laid down in City of New Orleans et al. vs. Bank of Louisiana above cited.

The court in that case say a decision as to an exemption for a certain year is *res judicata* as to the tax of a subsequent year when *the same* question of exemption is presented on the *same facts*.

Of course if the question in the case to be decided arose from a different statute or a different state of facts the decision in the first case would not be *res judicata* as to the last case.

In Whitbeck vs. Mercantile Bank the court based its decision upon a statute, or a *supposed* statute, different from the statute under which the plaintiff was required to list its property for taxation when the return was made which is the subject matter of this suit.

So that the court can see at a glance that the questions presented in the two cases are not the same we print in opposite columns the statutes ruled upon in the Whitbeck case and the statutes to be ruled upon in the case at bar.

STATUTE IN WHITBECK CASE AS STATED IN 127 U. S., 193. 2d. Syl.

"The statutes of Ohio regulating assessments for taxation *allow an owner of moneyed capital* other than shares in a national bank *to have a deduction equal to his bona fide indebtedness made from the amount of the assessment, of the value of such moneyed capital*; but they make no provision for a similar deduction from the assessed value of shares in a national bank, and provide no means by which such a deduction may be obtained."

STATUTE UNDER WHICH THE CASE AT BAR IS TO BE DECIDED.

Part of Sec. 2730 R. S. of Ohio.

*The term "credits" shall be held to mean the excess of the sum of all legal claims and demands whether for money or other valuable thing,* or for labor or service due, or to become due, to the person liable to pay taxes thereon, including deposits, in banks, or with persons in or out of this state, other than such as are held to be money, as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money) *over and above the sum of legal bona fide debts owing by such person*; but in making up the sum of such debts owing there shall be taken into account no obligation to any mutual insurance company, nor any unpaid subscription to the capital stock of any joint stock company, nor any subscription for any religious, scientific, literary, or charitable purpose; nor any acknowledgment of any indebtedness unless founded on some consideration actually received and believed at the time of making such acknowledgment to be a full consideration therefor; nor any acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation; nor any greater amount or portion of any liability as surety, than the person required to make the statement of such credits believes that such surety is in equity bound and will be compelled to pay, or to contribute, in case there be no secureties; provided, that pensions receivable from the United States shall not be held to be credits; and no person shall be required to take into account in making up the amount of credits a greater portion of any credits than he believes will be received or can be collected, or any greater portion of any obligation given to secure the payment of rent than the amount that shall have accrued on any lease, and remain unpaid.

The statute applicable to the case at bar has been construed by the Supreme Court of this state in the case of Chapman vs. National Bank of Wellington, Ohio, 56 O. S., 310.

That case was taken on error to the Supreme Court of the United States, 173 U. S., 205, and the judgment of the Supreme Court of this state was affirmed.

In delivering the opinion of the court, Peckham, J., in his statement of the case says:

> "The complaint is founded upon the allegation that the owners of what is termed credits in the law of Ohio (Rev. Stat., Sec. 2730) are permitted to *deduct certain kinds of their debts from the total amount of their credits*, and such owners are assessed upon the balance only, while no such right is given to owners of shares in national banks. The claim is that shares in national banks should be treated the *same as credits*, and their owners permitted to deduct their debts from the valuation. The *owners of property other than credits are not permitted to deduct their debts from the valuation of that property.*
>
> "It is also claimed that there is an unfavorable discrimination against the national bank shareholder and in favor of an unincorporated bank or banker.
>
> "At the outset it is plain that the system of taxation adopted in Ohio was not intended to be unfriendly to or to discriminate against the owners of shares in national banks for, as observed by the State Supreme Court, that system was adopted long prior to the passage of the law by congress providing for the incorporation of national banks. *Under this system the owner of shares in national banks is taxed precisely like the owners of shares in incorporated state banks.* Rev. Stats. Ohio, Sec. 2762."

It will be seen from this statement of the case that the complaint of the First National Bank of Wellington was identical with the complaint of the plaintiff in the case at bar. The Supreme Court of Ohio and the Supreme Court of the United States were called upon to construe the very statute which this court is now again called upon to construe. Upon the complaint as stated the court held:

> "The system of taxation adopted in Ohio was not intended to be unfriendly to, or to discriminate against owners of shares in national banks, and, in its *practical operation* it does not materially do so; and there is nothing upon the face of these statutes which shows such discrimination.

> "The term 'moneyed capital' in the act of congress fixing limits to state taxation on investments in national banks, Rev. Stat., Sec. 5219, does not include capital which does not come into competition with the business of national banks, and exemptions from taxation, made for reasons of public policy, and not as an unfriendly discrimination against investments in national bank shares, cannot be regarded as forbidden by those statutes."

It appears that counsel for the First National Bank of Wellington, in the Chapman case, claimed that the specific question involved in that case had been decided in the Whitbeck case.

But both the Supreme Court of Ohio and the Supreme Court of the United States denied the claim. Both courts base their decisions upon a construction of the same sections of the statute of this state, reciting them, and they are the same sections which this court is now asked to hold constitutes the basis of the judgment in the Whitbeck case.

We have shown that the court in the Whitbeck case found the statute of this state, relative to the taxation of bank property, to be as stated in the opinion of the court, *and found it as one of the facts in the case.*

We do not know from what source of information the court so found. Certain it is there is no such statute in force now.

If the court was mistaken as to the fact, this court, as a Court of Equity, will not go out of its way to confirm the mistake. Courts of Equity correct mistakes. There is no dispute as to what the law is. There is no dispute as to the construction given it by the Supreme Court of this state, and the Supreme Court of the United States, but still counsel for the bank ask this court to ignore the facts and adopt the mistake of the court in the Whitbeck case, and to base the decision of the case upon that mistake.

If the court made a mistake in finding the facts in the Whitbeck case, that finding is just as binding upon the plaintiff as it is upon the defendant.

If the supposed statute upon which the court based its decision in that case had no existence in fact, such fact erroneously found is as

binding upon the plaintiff as it desires to make the judgment based thereon binding upon us. *The plaintiff cannot adopt the judgment and repudiate the grounds upon which it is based.*

The facts upon which it is based are not the facts in the case at bar. We are claiming under a different statute than that upon which the court founded its decision in the Whitbeck case. The facts are different and there is no *res judicata.*

Cromwell vs. County of Sac., 94 U. S., 351.

We wish to especially call the court's attention to what the Supreme Court of Ohio said in the Chapman case about this same plea of *res judicata*, and why they refused to follow it as announced in the Whitbeck case.

56 O. S., 325.

"But it is said by counsel for the bank, that the question is res judicata, and has been determined and settled by the Supreme Court of the United States in Whitbeck vs. Mercantile National Bank of Cleveland, 127 U. S., 193.

The part of the syllabus on this subject is as follows:

" 'The statutes of Ohio regulating assessments for taxation allow an owner of moneyed capital, other than shares in a National bank, to have a deduction equal to his bona fide indebtedness, made from the amount of the assessment of the value of such moneyed capital; but they make no provision for a similar deduction from the assessed value of shares in a National bank, and provide no means by which such a deduction may be obtained. Held: That the owners of such shares are entitled to have a deduction of their indebtedness made from its assessed value as in the case of other moneyed capital.'

"That holding was right, if the Statute of Ohio were as recited. But, as already shown, the Statutes of Ohio do not allow a deduction equal to the bona fide debts to be made from the amount of the assessments of the value of moneyed capital in general, but only from a small and comparative insignificant amount of moneyed capital called 'credits,' and even from credits, only a certain and limited class of debts. If the court had recited in the syllabus, as a predicate for its holding, the provisions of the Ohio Statute as they really are, the holding would most likely have been different, and would have been as in First National Bank of Garnett vs. Ayers, 160 U. S., 660, in which the syllabus is as follows:

"'The single fact that the Statutes of Kansas regulating the assessment and taxation of shares in National banks permit some debts to be deducted from some moneyed capital, but not from that which is invested in the shares of National banks, is not sufficient to show that the amount of moneyed capital in the State of Kansas from which debts may be deducted, as compared with the moneyed capital invested in shares of National banks, is so large and substantial as to amount to an illegal discrimination against National bank shareholders, in violation of the provisions of Revised Statutes, Section 5219.'

"No examination of the provision of the Ohio Statute by the Court is found in the opinion in the Whitbeck case, except as to the procedure in demanding the deduction, and even as to that there is no examination shown by the court, but the finding of the Circuit Court is accepted as to such provisions.

"The sections of the Kansas Statute under review in the Ayers case, are almost identical with Sections 2730 and 2737 of our own state, and it would seem that the facts being the same, the same construction should obtain as to each.

"In the Whitbeck case it is assumed by the court, or at least recited in effect, that the Statutes of Ohio are in substance the same as the Statutes of New York, and permit a deduction of debts from the total amount of personal property, and Hills vs. Exchange Bank, 105 U. S., 319, is cited as authority for the holding. But turning to that case, we find that the principle upon which it was decided is, that the shareholders were not allowed to deduct their debts from their shares, while other parties were allowed to deduct their debts from the total amount of their personal property, and the case is founded upon Supervisors vs. Stanley, 105 U. S., 305, decided at the same time, and in that case the Statute of New York is set out, and shows that the owners of all personal property other than National bank shares, are allowed to deduct their debts from the total amount of their personal property.

*"If our statute contained that provision, it would be conceded at once that the holders of National bank shares should be accorded the same right; but they contain no such provision, and therefore it seems only proper that the question should again be presented to, and considered by the Supreme Court of the United States."*

The above is the reasoning of the Supreme Court of Ohio as to why the decision in the Whitbeck case was not considered *res judicata* upon this question. This position was followed and shown to be correct by this court in the same case when prosecuted here. We cite from Volume 173 U. S., pp. 219-220:

"It is stated, however, that this specific question has been otherwise decided in Whitbeck vs. Mercantile National Bank of Cleveland, 127 U. S., 193. *If this were true, we should be guided by and follow that decision.* Upon an examination of the case it is seen that the court gave chief attention to the question whether an increase in the value of the shares in National banks, made by the State Board of Equalization, from 60 per cent. of their true value in money, as fixed by the auditor of Cuyahoga county, to 65 per cent., as fixed by the board (other property being valued at only 60 per cent.), amounted to such a discrimination in the taxation of the shareholders of such banks as is forbidden by the Federal Statute. It was held that it did.

"Coming to the question of the deduction of the bona fide indebtedness of shareholders, *the court assumed, that under the Statute of Ohio owners of* ALL *moneyed capital,* other than shares in a national bank, were permitted to deduct their bona fide indebtedness *from the value of their moneyed capital,* but that no provision for a similar deduction was made in regard to the owners of shares in a national bank, and it was held that the owners of such shares were entitled to a deduction of their indebtedness from the assessed value of the shares as in the case of other moneyed capital. The point to which the court chiefly directed its attention related to the question whether a timely demand had been made for such deduction of indebtedness. It was held that it was made in time, for the reason that the court below expressly found that 'the laws of Ohio make no provision for the deduction of the bona fide indebtedness of any shareholder from the shares of his stock, and provide no means by which such deduction could be secured.' As a demand at an earlier period would have been useless, the court held it unnecessary.

"*An examination of the Statutes of Ohio in regard to taxation shows that debts can only be deducted from credits, and how much of credits is moneyed capital is unknown. The case is not authority adverse to the principle we now hold.*"

Thus, it is shown both by the Supreme Court of Ohio, and by the Supreme Court of the United States, that the latter court "assumed that under the Statute of Ohio owners of all moneyed capital other than shares in a national bank were permitted to deduct their bona fide indebtedness from the value of their moneyed capital." But upon examination "of the Statutes of

Ohio in regard to taxation they show that debts can only be deducted from credits." Thus the decision in the Whitbeck case was decided upon an erroneous assumption of what the Statutes of Ohio permitted with regard to the deduction of liabilities from credits, and it can therefore not be claimed to be res judicata of a claim arising under a statute differently worded and to which the Supreme Court of the United States has applied a different construction in the Chapman case, as above cited.

As the Supreme Court of the United States said in the case of K. & W. Ry. vs. Mo., 152 U. S., on p. 316:

> "It could never be tolerated that the state should be forever barred in its collection of taxes by an erroneous decision."

In this connection I desire to quote from the opinion of the learned Circuit Court the portion thereof that has special reference to this plea of res adjudicata, which is as follows:

"There remains to be considered the question arising under the claim of former adjudication made in this bill. Upon the argument, and before I had made a close examination of the bill, my impression was that upon this claim of former adjudication the complainant must succeed. It seemed to me that the adjudication in the former case was a mere adjudication of the necessary operation of the statute of Ohio to discriminate against national banks, and, therefore, that that question having been in judgment between the same parties, it must receive the same adjudication here. Looking into the bill, however, in the former case, and after an examination of National Bank of Wellington vs. Chapman, supra, I find that, in order to support the averments of the bill, it was necessary in that case for the complainant to rely, not only upon the statute of Ohio defining credits, but also on its practical operation in exempting moneyed capital in the hands of individuals in Ohio from taxation. The practical operation of a law of that character, to show how much, if any, discrimination there is, is a question of fact to be determined upon the evidence. A large amount of evidence was taken in the former suit and the court, in its decree, found the averments of fact as to the practical operation of the law of Ohio, in the bill, to be fully sustained. In other words, the court found the fact to be that for the years there in-

volved, the statute of Ohio, as enacted, operated to exempt so large an amount of the moneyed capital in the hands of individuals in that state as to discriminate against the holders of the complainant's shares, and result in the taxation of the stock at a much greater rate than was assessed upon other moneyed capital in the hands of individual citizens of Ohio. The adjudication, therefore, upon which the complainant relies, is an adjudication, not of law, but of fact; not of the fact at issue in the present case, but of the fact as to the practical operation of the law at the time of that adjudication, to wit, in 1887, in 1893 and in 1894.

"In this aspect, the fact as to the practical operation of the law in 1896 may be different from that in 1887 and the other years. A finding of the fact in 1887 does not conclusively establish a different fact of the same character in 1896 and 1897.

"For this reason, I cannot sustain the contention made on behalf of the complainant that the former adjudication conclusively entitled the complainants to the same relief as that which was granted it in the Whitbeck case.

"The exceptions to the master's report on this ground are, therefore, overruled."

It is thus shown by the opinion of the court that the judge who heard the case approached this question of res adjudicata somewhat in opposition to the claims of the treasurer herein, and was inclined to hold that the decree rendered in 1887 was a bar to any further proceeding involving those same questions as to the year 1897, but upon complete investigation held the Whitbeck case to be no bar to the present action.

If the opinion of the Circuit Court of Appeals is carefully studied, it will be observed that that court agrees in the proposition that the Whitbeck case was decided upon an *erroneous assumption* as to what the Statute of Ohio, (Sec. 2730), really contained. I quote from their opinion, (Rec. p. 456):

> "The proposition decided by the Supreme Court was, assuming the Ohio Statute to be different from what the bill declared it to be, and that it provided that moneyed capital, with the single exception of national bank shares, might have such deduction, it afforded an unlawful discrimination against

such shareholders within the meaning of the Federal Statute. *In other words, the Supreme Court decided the question upon an erroneous assumption, not based on the allegations in the bill of complaint or certified in the questions submitted.* The general decree in favor of the bank in that case can be supported by the unlawful discrimination in the increased valuation of the shares of the banks. *The real question made under the Statutes of Ohio, as they in fact existed, was not passed upon by the Supreme Court of the United States in that case.*

The Circuit Court of Appeals recognizing that the judgment in the Whitbeck case, could not be plead as *res adjudicata* in the case at bar, because decided upon an "erroneous assumption" as to the Ohio Statute, said:

> "The general decree in favor of the bank in that case can be supported by the unlawful discrimination in the increased valuation of the shares of the bank."

We admit that the Whitbeck decision can be so sustained; because, it was found as a fact in that case that unlawful discrimination did exist against the bank by reason of a lower valuation adopted in eleven other counties of the state. (127 U. S., 193.) But that does not avail the bank as *res adjudicata* here, unless the same state of facts also appear in the case at bar. The Master found as a fact (Rec. p. 40), as follows:

> "But there is nothing in these reports or in the evidence elsewhere to show what portion of credits consists of moneyed capital in the hands of individuals which in fact enters into competition for business with National banks. Nor is there any evidence as to what the total moneyed capital in the hands of individual citizens and included in the term credits amounts to.
>
> * * * * *
>
> *There is nothing in the evidence that will show whether shares on incorporated banks in the counties of the state outside of Cuyahoga county were valued for taxation by the auditors at a higher or lower percentage compared with the true value in money of their stocks than were the banks of Cuyahoga county, and hence the master is unable to report or find whether there was any unjust discrimination as between other incorporated banks and the complainant bank, and against the complainant bank."*

Such discrimination not existing here, as it did exist in the Whitbeck case, and it having been decided upon an "erroneous assumption" as to the Ohio Statute, what merit is left in it, upon which to predicate a claim of *res adjudicata?* It is an able exposition of the law as applicable to the proven facts, then existing, but not available to the bank as an eternal rule to shield it against the payment of its just taxes.

But the Circuit Court of Appeals went further, and entirely destroyed the claim of the bank that the decree of 1887 was *res adjudicata*, in the following language, (Rec. p. 457):

> "In view of the foregoing comments on the decision in the Whitbeck case, and the erroneous assumption therein of the character of the Ohio Statute, we are not prepared to say that the judgment in that case was *res adjudicata* as to the rights of complainant stockholders to deduct their debts from their shares of national bank stock."

It thereupon abandons the decree of 1887, and with that the Whitbeck case passes out of further consideration; but they say, (Rec. p. 458):

> "A different question is presented by the allegations of former adjudication in the bills filed in 1893 and 1894." And they hold, (Rec. p. 461):
>
> "The former adjudications in the cases of *1893 and 1894* are conclusive between the parties, notwithstanding the subsequent decision of the Supreme Court in the Chapman case. In reaching a contrary conclusion, we think the Master as well as the Circuit Court erred."

In brief, that court held that the decree of 1887 could not avail the bank, but that the decrees rendered in the case of 1893 and 1894 would so avail.

*This was error.*

(a) In holding that any decree of *1894* was *res adjudicata;* because no such decree was plead by complainant. The only decrees plead as *res adjudicata* were those of April 8, 1887; May 14, 1888; September 28, 1889, and December 30, 1893. (See Bill of Complaint, Par. 15 and 16, pp. 10-11, Rec.)

(b) The court having eliminated the decree of April 8, 1887, (the Whitbeck decree), and not having held that the decrees of May 14, 1888, and September 28, 1889, constituted former

adjudications, we are not concerned with any of those plead except that of December 30, 1893. That decree is found on pp. 256-257 of Record, being case No. 5122, and is rendered upon a bill of complaint that contains the Whitbeck decree as its sole ground for relief.

(c) The grounds urged by the learned Circuit Court of Appeals that the Whitbeck decree could not avail the bank as *res adjudicata*, likewise destroys the decree of December 30, 1893, because the former is made the basis of the latter. (Rec. p. 250.) If not of any force in the decree of April 8, 1887, it cannot be in the decree of December 30, 1893.

(d) Other and different issues are presented in the Bill of Complaint (Rec. pp. 3-12) than were embraced in the bill of June 27, 1893, (Rec. pp. 246-251).

(e) The decree of April 5, 1894, (Rec. p. 270), is a decree by default; it cannot operate as a prior adjudication; it only admits for the purpose of the action the legality of the claim or demand in suit; it does not make the allegations of the declaration or complaint evidence in an action upon a different demand. (94 U. S., 356.)

But we desire to further show, that, in the language of this court in the case of New Orleans vs. Citizens' Bank, 167 U. S., 372, the questions made in the case of 1887 were not "made upon identically the same facts and circumstances as those here presented." They cannot, therefore, be res adjudicata conclusive upon the parties and estop the appellee from attempting to enforce such taxes. The point to which we directly call the court's attention is found in the Finding of Facts, Record, pp. 58 and 59, being a quotation from the bill of complaint in the old case of Mercantile National Bank of Cleveland against Horatio N. Whitbeck, Treasurer, and is as follows:

> *Second*—"That the laws of Ohio authorize and permit the owner of *credits* to deduct therefrom *all debts* owing by him. It requires him to list for taxation only the excess of credits over his indebtedness."

That averment is not contained in the bill in the case at bar. But, on the contrary, the averment that most nearly approaches it is as follows:

> "The complainant further avers that a large amount of *moneyed capital* in the hands of individual citizens of the State

> of Ohio invested in promissory notes and other legal obligations, securities, claims, and demands, amounting to several hundred millions of dollars, is, by the aforesaid provision, allowed a deduction of legal, bona fide debts to be made therefrom, expressly exempted from taxation."

It will be observed by the court that the proposition presented in the Whitbeck case was the right to deduct from credits generally *all debts,* while in the case at bar, the proposition is to deduct from *certain credits,* defined by Section 2730 of the Revised Statutes, *certain debts* which are also defined by the Statute.

The one proposition does not embrace the other, for it has been repeatedly held by the Supreme Court of the United States that a partial exemption of certain property from taxation does not create an inequality or a discrimination such as is provided against by Section 5219 of the Revised Statutes of the United States, and also provided against by Section 2, of Article 12, of the Constitution of Ohio, which says, "That laws shall be passed taxing by a uniform rule all moneys, credits, etc."

> Albany County vs. Stanley, 105 U. S., 305.
> Lionberger vs. Rouse, 9 Wall, 468.
> New York vs. Comrs. of Taxes, Wall, 244.
> Hepburn vs. School Directors of Carlisle, 23 Wall, 480.
> Adams vs. Nashville, 95 U. S., 19.

We paraphrase the same inquiry made by the Supreme Court U. S. in New Orleans against Citizens' Bank, 167 U. S., quoting from page 389, and inquire:

> "Was the final decree in the Whitbeck case, which held that there was no power to lay taxes on the valuation of the shares of that bank for the year 1887, *based upon the identical claim of exemption* now asserted by that bank in order to defeat the taxes here in question?"

We must conclude that the claims of exemptions made in these different cases are not identical. One claims it for *all debts* from *all credits;* the other claims it for *some debts* from *some credits,* as specifically defined by the Ohio statute. Quoting again from the above decision:

> "It must appear the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed."

In the City of New Orleans vs. Citizens Bank, 167 U. S., 371, the

judgment relied upon as res adjudicata was one in which it was sought to enjoin the taxing authorities not from enforcing an assessment already levied, but to enjoin them from making any assessment whatever against it, on the ground that its charter exempted it from taxation. And upon that ground only, the judgment was rendered enjoining any tax assessment proposed to be made in the future. Thus the right to exemption from taxation for the future was presented and litigated, and decided in favor of the bank. Not so with the case at bar. The Whitbeck case, pleaded as res adjudicata in this case, was an action brought by the bank for and on behalf of its stockholders to enjoin the collection of a tax assessment already levied, and on the grounds of discrimination, under the provisions of Section 5219 of the Revised Statutes of the United States, against the shares of national banks in favor of other moneyed capital. First: In assessing the shares of national banks at a higher rate than other moneyed capital. Second: In not permitting the share holders to deduct their bona fide debts from their shares of stock. The Whitbeck case involved an assessment for *one year only, nothing more*. Each subsequent tax assessment must always involve new facts. While the same principle of law might be involved, yet the subject matter must necessarily be entirely distinct each year.

> "Even parties and privies are bound only so far as regards the subject matter then involved, and would be at liberty to raise the same question anew in a distinct controversy affecting some distinct subject matter."
>
> Cooley's Constitutional Limitations, p. 63.

The principle we contend for is so admirably stated in the case of Keokuk & Western Railroad Company vs. Missouri, that we take the liberty of quoting at length.

> "A suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are distinct and separate causes of action. If there were any distinct question litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit upon the principle stated in Cromwell vs. County of Sac, 94 U. S., 351.
>
> * * * * *
>
> The same principle was reaffirmed in Nesbit vs. Riverside Independent District, 144 U. S., 610, and Wilmington & Weldon Railroad vs. Alsbrook, 146 U. S., 279, 302. In the case of Davenport vs. Chicago, Rock Island, &c. Railway, 38 Iowa,

633, 640, the Supreme Court of Iowa held that a decree in favor of a railway company in a suit for taxes for a prior year would not estop the State from collecting the taxes for a subsequent year, each year's taxes constituting a distinct and separate cause of action. "The cases," said the court, "are unlike those where two causes of action (as two prmissory notes) forming the subject matter of successive actions between the same parties, both growing out of the same transaction, in which a defense set up in the first suit, and held good, will conclude the parties in the second. * * * Taxes of separate years do not in any just sense, grow out of the same transaction. They are like distinct claims on two promissory notes made upon two distinct and separate, though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties." It could never be tolerated that the State should be forever barred in its collection of taxes by an erroneous decision."

In the case of City of Newport vs. Commonwealth, 50 South Western Reporter, 845 (Kentucky Court of Appeals), it was held that,

> "A judgment for defendant in an action to recover taxes for one year is not a bar to an action to recover taxes on the same property for another year."

We believe it proper here to say, that we consider this an attempt on the part of the defendant bank, to extend the doctrine of estoppel far beyond what any of the authorities warrant. If their view is accepted, it gives to complainant bank the right to deduct the debts of its shareholders from the value of its shares, for taxation purposes, being a right denied by this court to any other bank in Ohio, (173 U. S., 205). This is supposed to be done under a constitution containing a section requiring taxation to be by uniform rule, and another, saying, "*All* property employed in banking, shall always bear a burden of taxation equal to that imposed upon the property of individuals."

Therefore, we conclude that the decrees plead in bar can not constitute a bar or estoppel between these parties, referring to a different year based upon a different claim of exemption, and not being conclusive upon the facts it is not conclusive of the law governing the questions presented. Respectfully submitted,

J. M. SHEETS, Atty. Gen'l.

P. H. KAISER, County Solicitor Cuyahoga County.

SMITH W. BENNETT, of Counsel.

2659

No. 227.
Sup. Ct. Bf. of Sheets, Kaiser & Bennett for Appellant.

# Supreme Court of the United States.

No. 227.
Filed April 7, 1902.

MARCELLUS A. LANDER AS TREASURER OF CUYAHOGA COUNTY, OHIO,

APPELLANT,

vs.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,

APPELLEE.

---

## SUPPLEMENTAL BRIEF.

We considered it necessary to file a supplemental brief herein to dwell more at length upon the proposition contained in the amendment to the answer of the county treasurer, thereby raising the same inquiry which was presented below, that the reply contained in the amendment to the answer constitutes a full defense to the matters contained in the bill.

The amendment to the answer filed herein (Rec., pp. 28-31) presents the question, that the Board, composed of the Governor, Auditor of State and Attorney General, commonly known as "The Board of Tax Revision," created under Section 167 of the Revised Statutes of Ohio, had, at the time of the commencement of these actions in the Circuit Court of the United States, full power to hear and determine upon the complaint of any of said banks as to the amount of taxes illegally assessed, and that said Board could

remit any amount of taxes and penalties upon the duplicate, found by them to have been illegally assessed.

That if said contention be true, the Federal court has no jurisdiction to review the proceedings had before the Board for the equalization of bank values, by an equitable remedy, as by injunction, or in any other form, for they are not courts of error to review the findings of State officers, boards or courts, and their jurisdiction in such matters as are involved in these actions, can not be appealed to until the remedies provided by the Statutes of the State have been invoked and relief refused.

The well known rule of procedure in equity has been adopted in the Revised Statutes of the United States to govern the procedure in equity in all of the Federal courts. Section 723, R. S., U. S., is as follows:

> "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

This lays the predicate for the inquiry. Was there a plain, adequate, and complete remedy provided by the Statutes of Ohio for the complainant in these actions?

Section 167 of the Revised Statutes of Ohio is as follows:

"He (The Auditor of State) may remit such taxes and penalties thereon as he ascertains to have been illegally assessed, and such penalties as have accrued or may accrue in consequence of the negligence or *error of any officer required to do any duty relating to the assessment of property for taxation, or the levy or collection of taxes; and he may, from time to time, correct any error in any assessment of property for taxation or in the duplicate of taxes in any county; provided, that when the amount to be remitted in any one case shall exceed one hundred dollars he shall proceed to the office of the Governor and take to his assistance the Governor and Attorney-General, and in all such cases may remit no more than shall be agreed upon by a majority of the officers named.*"

Full power shall be given to said Board to remit taxes and penalties in *any* amount, that may have accrued in consequence of the negligence or error of *any* officer required to do *any* duty relating to the assessment of property for taxation, or the levy or collection of taxes.

The word *"any"* is a word of general signification, and is synonymous to "all", and the word "all" is synonymous to the word "any."

Stone v. Elliott, 11 Ohio St., 258.
Smith Bridge Co. v. Bowman, 41 O. S., 37, (see p. 52).
Collector v. Hubbard, 12 Wall., 1.
Murray v. Brown, 91 U. S., 254.

It is impossible, we submit, to read Sec. 167 without giving it the broad, general interpretation which its language imports. It contains no word of restriction. The words used are plain and free from any ambiguity, and their meaning, so deduced, is consistent with the manifest purpose of the Legislature, which was, as we submit, that the State Auditor should act as its chief ministerial officer in all matters pertaining to the illegal assessment of taxes. It therefore conferred upon him power to "remit such taxes and penalties thereon as he ascertains to have been illegally assessed, and such penalties as have accrued or may accrue in consequence of the negligence or error of any officer required to do any duty," etc. And to fully and perfectly carry out this duty, it further authorized him to correct from time to time, "any error in any assessment of property for taxation or in the duplicate of taxes in any county." The Legislature evidently realized the broad power it was thus placing in the Auditor of State, and, as an additional safeguard, it therefore provided, "that when the amount to be remitted in any one case shall exceed one hundred dollars he shall proceed to the office of the Governor and take to his assistance the Governor and Attorney-General, and in all such cases may remit no more than shall be agreed upon by a majority of the officers named."

Language could not be employed to more broadly express the jurisdiction thus conferred. It embraces the negligence or error of *"any officer required to do any duty relating to the assessment of property for taxation"*, hence it embraces among others the Auditor of Cuyahoga County, the Treasurer of Cuyahoga County, and the State Board for the equalization of bank shares. By glancing at the bill of the plaintiff in all of these cases, it will be found in paragraph four (4) thereof that the plaintiff complains of the acts of the

County Auditor and of the Board for the Equalization of Bank shares, averring that the Board "had no jurisdiction or power to increase the valuation so fixed by the Auditor on the shares of the complainant for the year 1897." The increase of the valuation is made the ground of the plaintiff's grievance. If what plaintiff recites at great length in its bill be true, the power to correct such errors, if any, is given to the Board of Tax Revision and under the plainest principles of equity jurisdiction recourse cannot be had to equity until the plain legal remedy has been exhausted.

With the remedy provided by Section 167 Revised Statutes of Ohio, open to the plaintiff, why did it not make its application before said Board to "remit such taxes * * * illegally assessed * * * and to correct any error in * * * assessment, * * * or in the duplicate of taxes in (said) county"?

Surely, if the remedy thus provided was applicable, it was sufficiently comprehensive to embrace the relief desired.

This refusal or neglect on the part of the plaintiff to appeal to said board is attempted to be explained.

(1) By matter of fact.

(2) By matter of law.

Of these objections in their order.

(1) MATTER OF FACT.

The deposition of the Auditor of State, found on page 385 of the record of the testimony taken before the special examiner bearing upon this question, is as follows:

Q. Do you remember of a committee representing the plaintiff banks appearing at your office to inquire about the action of the Board for the equalization of bank values with regard to the action taken on the value of their bank shares? A. Yes, sir, a committee of the Cleveland banks called on our board for that purpose.

Q. State what took place between said committee and said board with regard to submitting their claims for reduction, grievances or errors claimed to the board as organized under Section 167 of the Ohio Statutes? A. The Board informed the committee that it was

too late to give a hearing and relief as a State Board of Equalization for banks, for the reason that the Board had adjourned sine die, but that we would give them a hearing under Section 167.

Q. State whether you then offered to convene said Board of Tax Revision organized under Section 167 to consider the cases of the various plaintiff banks? A. Yes, sir; we offered to convene the Tax Revision Board at such time as might be convenient for the representatives of the Cleveland banks to appear.

Q. Do you remember what their answer was, to the proposition so made, and why, if at all, they refused to submit their case to the consideration of said Board of Tax Revision for hearing? A. I do not remember all that was said in regard to the action of the Board under Section 167 but some doubt was expressed by some of the members of the committee that the Board would not have the power under Section 167 to afford as full relief as the Board of Equalization.

Q. State what the fact is as to whether they did or did not submit their case and grievance and alleged errors before said Board of Tax Revision? A. Only one of the Cleveland banks appeared before the Board, and that was Mr. Wilson of the First National, the others did not, the others declined under the advice of counsel."

We also cite the following testimony taken from that given by Mr. J. J. Sullivan found on pages 313 and 314 of the record of testimony taken before the special examiner:

A. *On the seventh of December, 1897, I received a letter* from the county auditor stating that the Board of Equalization had increased the valuation of our bank something over $100,000. The other national banks in the city received similar notices. The result was we had a meeting of the Clearing House for conference as to what to do. That meeting, I think, was about the tenth or twelfth of December. At that meeting a committee of five was appointed to go to Columbus to confer with the State Board of Equalization. The committee was composed of Joseph Colwell, F. E. Rittman, E. H. Bourne, M. G. Warner and myself. I was requested to arrange with the Governor for the meeting. I wired the

Governor immediately after the adjournment of our Clearing House meeting, and it was along about the twelfth of the month as I have said, asking for an appointment with the State Board of Equalization. He answered that Mr. Guilbert and Mr. Monnett were absent on their vacation and would not return to the city of Columbus until about the twenty-second of December, when he would arrange for a meeting with our committee. On the twenty-eighth of December I got a telegram from the Governor saying that the gentlemen comprising the Board with himself who were absent, had returned, and that they would meet our committee at 2 o'clock on Wednesday, December 29. We went the next day wiring the Governor beforehand saying we would be there. This is a copy of my telegram:

Q. What is the date of it? A. December 28.

By Judge Boynton: Read it.

Witness reads: "Governor Asa S. Bushnell, Columbus, Ohio, Our committee will meet State Board of Equalization tomorrow, Wednesday, at 2:30 p. m."

He said 2 o'clock, but as our train would not reach there until 2:30 I took the liberty to make the date a half hour later.

Q. Is that the extent of the explanation you desire to make? A. That covers it.

Q. Governor Asa S. Bushnell was the president of the Board for the equalization of bank values? A. Yes, that is why we addressed him.

Q. When you met there at the time did you file any complaint with said Board? A. Any written complaint, do you mean?—No.

Q. This was all prior to the time that the bank had paid their tax, was it not, up to December 28? A. Yes. We have been permitted to pay our tax a month later. Yes, it was prior to the time of the payment of our tax.

*Q. After the members of said Board suggested to you that you could have any inequalities corrected—if they so did suggest—before them as a Board of Remission, did you submit any evidence before them as a Board of Remission? A. No, sir.*

*Q. Was there any evidence submitted at any other time before them, than what you have given?* A. Do you mean pertaining to this particular meeting?

Q. Either before or after December 28? A. *No, not in regard to the tax of 1897.*

Q. You had received word from the County Auditor of the action of the State Board for equalization of bank values *on December 7, 1897*, had you not? A. That's my recollection."

This testimony thus shows that before the commencement of these actions, the plaintiff bank by its representative, was requested by members of said Board to lay before said Board the contention or grievance of said bank in the premises, and if anything was found wrong in the action of the Board for the Equalization of Bank Shares, or any error committed by said Board, or any amount charged against plaintiff bank that should be remitted, they would entertain the same, and do what was just in the premises. The answers of the various banks were, That the Board of Tax Revision *had no jurisdiction, and acting under advice of counsel they did not, and they would not appeal to it.*

The finding of the Special Master Commissioner upon the evidence adduced in support of this defense is found in paragraph eighth, record page 37, as follows:

> "At the time the persons who had composed the State Board of Equalization for Banks, and who are the same persons required to act under Section 167 of the Revised Statutes of Ohio, offered to convene and organize under said Section 167 to consider the case of the various plaintiff banks at such time as might be convenient for the representatives of the Cleveland banks to appear, some doubt was expressed by some of the members of the committee that the Board would not have the power, under Section 167, to afford as full relief as the Board of Equalization, and only one of the Cleveland banks appeared before the Board when organized under Section 167, viz, The First National Bank, the others declined to appear."

The question is fairly presented, that the banks having fair opportunity to present their contention before said Board of Tax Revision, *before these actions were begun, and before any other juris-*

*diction might have attached*, would said Board have had jurisdiction to hear and determine the question of the amount placed upon the duplicate against said plaintiffs and claimed to be an "excessive amount", and that should be deducted from the assessment against the plaintiff's shares" as claimed in Paragraph 13 et seq., of plaintiff's Bill?

We say that the Board of Tax Revision had jurisdiction so to do, the plaintiff contends it had not.

(2) MATTER OF LAW.

On the theory that said Board, organized under Section 167 Revised Statutes, had no authority to review the action of the County Auditor of Cuyahoga County and the Board for the Equalization of Bank Shares, organized under Section 2808 to 2810 of the Revised Statutes, these actions were instituted by said banks.

Section 167 Revised Statutes, vests certain powers in the State Auditor which are of an appellate and revisory character, and above the action of any officer required to do any duty relating to the assessment of property, or levy or collection of taxes.

There is but one limitation placed upon such power of the auditor, and that is a limitation as to amount.

"That when the amount to be remitted in any one case shall exceed one hundred dollars he shall proceed to the office of the governor and take to his assistance the governor and attorney-general, and in all such cases may remit no more than shall be agreed upon by a majority of the officers named."

With the governor and attorney-general acting in conjunction with the auditor of state, *no* limitation is placed upon their powers to hear and determine questions arising upon the actions of any board or officer constituting a part of the taxing machinery of the State.

All tax laws of the State of Ohio, taken together as a whole, provide for a summary method of collecting revenue. The various agencies adopted for such purpose consist of assessors, City Boards of Equalization, the different administrative officers who adopt the

rate and establish the purpose of the levy as county commissioners and councils of municipalities, County Boards of Equalization, County Auditors, County Treasurers, State Boards of Equalization, embracing the Board for the Equalization of Bank Shares, and the State Board for the equalization of the values of railroad property; a state board of appraisers and assessors, besides various special boards provided by statute for certain cities, and at the head of the whole system, above all such officers, and boards, the State Auditor, and the Board of Tax Revision, vested with revisory power by Section 167 Revised Statutes.

All these taxing officers are vested with quasi judicial power in the appraisal and assessment of property. They exercise discretion and judgment, and if they commit errors and mistakes the Board or tribunal is provided by Statute (Sec. 167) in which the same can be reviewed and corrected.

It is only when these various tribunals and authorities are appealed to and refused relief, or when they are guilty of fraud, that the courts step in to review and correct the valuations (and errors) of such taxing officers or tribunals.

"Our statutes have made ample provision for the correction of mistakes and errors of judgment committed by those intrusted, in the first instance, with the fixing of values upon taxable property. *Even unjust and corrupt discrimination can be relieved against, in the special tribunals provided by the statutes, for the equalization of values. As a general rule, the decisions of these boards must be held to be final and conclusive. To these boards and not to the courts, must complaints as to inequalities in valuations be preferred*"
* * *

"There is nothing in the record to lead us to believe that the annual city and county boards of equalization would not, if complaint had been made, have advanced the valuation of all other property in the county, to its true value in money. *The opportunity provided by law for the correction of the inequalities complained of, was omitted.*" * * *

"Equity will not afford relief to a complainant who cannot show that the burden imposed on him is greater than it would have been, if the laws had been faithfully executed, by taxing all property by a uniform rule, and according to its true value in money; *and also,*

*that the tribunals provided in the system of taxation, for redress against irregularities, had been appealed to in vain."*

Wagoner v. Loomis, 37 O. S., from page 582.

In the case of the State ex rel. v. Jones, Auditor, 51 O. S., 492 to 518, the question was raised as to the extent of jurisdiction vested in The Board of Tax Revision under Section 167 Revised Statutes. It was contended that the "Nichols Law", creating the Treasurer, Attorney-General and Auditor of State a Board of Appraisers and Assessors, by which to levy an excise tax upon express, telegraph and telephone companies, was unconstitutional, and among other reasons assigned was the following, being paragraph four of defendant's answer. (See page 499 supra):

"The property of said company is taken without due process of law, in violation of the 14th amendment of the constitution of the United States, in this, that there is no provision for a notice to the company, and for a hearing by the board of appraisers and assessors, and no appeal is provided to any superior authority for the correction of illegal, erroneous or excessive valuations."

The court in passing upon that point said:

"It is said however, that the act under consideration makes no provision for an appeal to any higher authority, board or tribunal authorized to hear complaints, and correct excessive, illegal or erroneous assessment. The power vested in the State Auditor, by Section 167 of the Revised Statutes, to correct errors of assessment, though not supplying a complete remedy, is not inapplicable we think, to the procedure under the Act of April 27, 1893, (90 O. L., 331). The Section reads as follows: (Section 167).

"This section is *in pari materia*, and is a part of the taxing system of the State, or of the machinery for collecting the public revenue. The Nichols Law is part of the same system and is merely an amendment and supplement of the sections of the statute regulating express and telegraph companies. While it might seem improper to submit the quasi judicial action of a board composed of the Treasurer, Attorney General and Auditor of State to the review of the State Auditor alone, it would not seem exceptional when the amount of taxes to be remitted exceeded one hundred dollars, that there might be an appeal to a board consisting of the Governor, Auditor of State and Attorney-General."

So that in the case cited it was distinctly held that the Board of Tax Revision has revisory or appellate powers over the acts of the

Board of Appraisers and Assessors, appointed under Sections 2772 et seq., of the Revised Statutes. Such board is part of the taxing machinery of the State, with power to pass upon the value of the different companies' property in this State for taxation, pursuant to established rules. From the judgment of said Board of Appraisers and Assessors a right of appeal is held to lie to the Board of Tax Revision.

Likewise, the Board for the Equalization of Bank Shares, created under Section 2806, et seq., Revised Statutes, is also part of the taxing machinery of the State, with power to pass upon the value of shares of incorporated banks for purposes of taxation. And from the judgment of said board it likewise follows that a right of appeal lies to the Board of Tax Remission under Section 167, Revised Statutes, for if such remedy is applicable in the one case it is in the other also.

In the more recent case of the State of Ohio ex. rel. The Commissioners of Marion County vs. Charles W. Lefller, Treasurer, etc., found in Vol. 40, No. 9, W. L. B., pages 174 to 182, the same point was again decided by the Supreme Court of Ohio; holding that the Board of Tax Revision has authority to review the action of other taxing officers, and to remit taxes illegally assessed.

In the case of Black et al., Trustees, vs. Haggerty et al., 60 Ohio State, 551 to 559, the above unreported case is affirmed by the whole court upon the proposition we here contend for. The Supreme Court of Ohio did hold in that case that the Board of Tax Revision created under Section 167 R. S., had no authority to substitute its judgment for the judgment of the Cleveland Board in a case in which it might legally act, and it held that the attempted substitution of the judgment of the State Board for the judgment of the Cleveland taxing officers was without authority because that section only grants authority to remit taxes which had been charged without authority of law. The court used the following language on page 558, supra:

> "The case (State ex rel. Commissioners v. Leffler, supra) is authority for the proposition that the Auditor of State may remit additions and penalties charged by the county auditor against a corporation without authority of law; nothing further was presented or decided, and this, we think, suggests the limits within which the State Auditor may act in making such remissions."

That is the identical question presented here, and the claim is set forth in paragraph 4 of the plaintiff's bill, hereinbefore cited, that the additions complained of as made by the State Board for the Equalization of Bank Shares were illegally made, and the additions thereto were without authority of law.

The power to raise revenue for the needs of the State, and its institutions, is a matter of State legislation and under State control. This being true the State Legislature has the power to prescribe the methods of hearing and determining all controversies relating thereto, both to the State and the taxpayer.

The power vested in the Legislature by the Constitution authorizes the enactment of such laws as will effect these objects.

The Constitution of Ohio provides, in part (Section 2, Article XII):

"Laws shall be passed taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money." * * *

Section 3, Article XII, provides:

"The General Assembly shall provide by law for taxing the notes and bills discounted or purchased, moneys loaned, and all other property, effects, or dues, of every description (without deduction), of all banks, now existing or hereafter created, and of all bankers, so that all property employed in banking shall always bear a burden of taxation, equal to that imposed on the property of individuals."

Section 4, Article XII, provides:

"The General Assembly shall provide for raising revenue, sufficient to defray the expenses of the State, for each year, and also a sufficient sum to pay the interest on the State debt."

In the light of the above sections taken from the Constitution of Ohio, there can be no question but that the Legislature had the au-

thority vested in it to create the methods by which taxes for State and municipal expenses should be collected, and also to create the forums or tribunals within which all disputed questions, with regard to levy, assessment, valuation, etc., should be determined. This principle is not hostile to the Constitution, State or Federal, nor to the Bill of Rights. The true rule for ascertaining the powers of the Legislature is to assume its powers, under the above general grants, to be ample enough for any enactment within the scope of legislation, unless restrained by the terms or the reason of some express inhibition.

The State, Etc., vs. Covington, 29 O. S., 102.
The State ex. rel. Herron vs. Smith, 44 O. S., 372.

The legislative determination of such questions is conclusive upon the courts, unless it appears upon the face of the statute, or from facts of which the courts must take judicial cognizance, that the statute infringes rights secured by the fundamental law.

127 U. S. Rep., 678.

## CAN THE FEDERAL COURT GRANT THAT RELIEF?

The Supreme Court of the United States cannot review the assessment made by the State officials upon the ground that it is excessive.

Stanley vs. Supervisors, 121 U. S., 549.

The courts cannot, in such cases, take upon themselves the functions of a revising or equalizing board.

Newman vs. Supervisors, 45 N. Y., 676, 687.
Nat. Bank of Chemung vs. Elmira, 53 N. Y., 49-52.
Bruecher vs. Village of Portchester, 101 N. Y., 240, 244.
Lincoln vs. Worcester, 8 Cush., 55-63.
Hicks vs. Westport, 130 Mass., 478.
Balfour vs. Portland, 28 Fed. Rep., 738.

"In nearly all the states, probably all of them, provision is made by law for the correction of errors and irregularities of assessors in the assessment of property for the purposes of taxation. This is generally through boards of revision or equalization, as they are often termed, with sometimes a right of appeal from their decision to the courts of law. They are established to carry into effect the

general rule of equality and uniformity of taxation required by constitutional or statutory provisions. Absolute equality and uniformity are seldom, if ever, attainable. The diversity of human judgments, and the uncertainty attending all human evidence, preclude the possibility of this attainment. Intelligent men differ as to the value of even the most common objects before them—of animals, houses and lands in constant use. The most that can be expected from wise legislation is an approximation to this desirable end; and the requirement of equality and uniformity found in the constitutions of some states is complied with, when designed and manifest departures from the rule are avoided.

To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, where the assessing officers had jurisdiction to assess the property. Their action is judicial in its character. They pass judgment on the value of the property upon personal examination and evidence respecting it. Their action being judicial, their judgments in cases within their jurisdiction are not open to collateral attack. If not corrected by some of the modes pointed out by statute, they are conclusive, whatever errors may have been committed in the assessment. As said in one of the cases cited, the money collected on such assessment cannot be recovered back in an action at law, any more than money collected on an erroneous judgment of a court of competent jurisdiction before it is reversed." 121 U. S., 550.

Our view of this question, that the Federal Courts cannot be appealed to in such case by injunction where a remedy at law exists, is fully sustained in the case of Dows vs. The City of Chicago, 78 U. S. Reports, p. 108. The court say:

"Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment, constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction, before the preventive remedy of injunction can be invoked. It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operation of the government and

thereby cause serious detriment to the public. No court of equity will therefore allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, *and he has no adequate remedy by the ordinary processes of the law.*"

We quote again from page 112 of the same report:

"The party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff, protesting against its enforcement, might have had his action, after it was paid, against the officer or the city to recover back his money, or he might have prosecuted either for his damages. No irreparable injury could have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action."

In a great number of cases it will be found where the jurisdiction of the Federal Court was not questioned, but where the parties submitted themselves to its jurisdiction, the court upheld the jurisdiction, but it *was by reason of it not having been questioned by either side.* As was said by the court, per Justice Field, in 11 Wallace, p. 110:

"In the cases where equity has interfered, in the absence of these circumstances, it will be found, upon examination, that the question of jurisdiction was not raised, or was waived. Such was the case of the Bank of Utica vs. The City of Utica, where the tax was illegal, and the chancellor stated that the complainant had a complete remedy at law, but as the parties submitted themselves to the jurisdiction of the court, he passed upon the case and enjoined the defendants from collecting the tax. So in the case of the Utica Manufacturing Co. vs. The Supervisors of Oneiga County, a demurrer to a bill filed to restrain an illegal tax having been overruled, the chancellor affirmed the ruling, stating, however, that as no question was raised by counsel respecting the jurisdiction of the court, he had not considered whether it was a proper case for equitable cognizance. Numerous cases are found in the reports where jurisdiction has been taken under similar circumstances and the collection of an illegal tax restrained, but our attention has not been called to any well-considered case where a court of equity has interfered by injunction after its jurisdiction was questioned, except upon some one of the special circumstances mentioned."

We are not in this part of our brief discussing the proposition as

to whether or not *The Board for the Equalization of Bank Shares,* had or had not jurisdiction to make the addition to the amount charged against plaintiff on the duplicate, but we here contend, *that independent of whatever action was taken by said board,* there can be no question but that plaintiff's remedy for the correction of any error, inequality or injustice, if any, was before the Board of Tax Revision under Section 167, Revised Statutes, and under the above authorities the plaintiff must submit to the jurisdiction *"of these boards of revision, by whatever name they may be called, for relief against excessive and irregular taxation," and cannot appeal to the Federal Court.*

The court in the case of Dows vs. The City of Chicago, supra, said on page 112:

"If the tax was illegal the plaintiff protesting against its enforcement might have had his action after it was paid, against the officer of the city to recover back the money or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action."

In that case the question was raised by demurrer to the bill. In the case at bar we raised the question by an amendment to the answer, tendering the issue that an adequate remedy at law exists and for that reason this court could acquire no jurisdiction.

The adequate remedy is not alone the proceeding before the Board of Tax Revision under Section 167 of the Revised Statutes of Ohio, but we have also various statutes for relief against illegal taxes and assessments.

The following sections are in point:

"Section 5848. The Courts of Common Pleas and Superior Courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either, and all actions to recover back such taxes and assessments as have been collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected."

As decisions under this section construing its operation by the

Supreme Court of Ohio, it has been decided that taxes paid under protest may be recovered back in the following cases:

Andrew Stevens, Treas. of Lucas Co., vs. R. C. Daniels, 27 O. S., 527.
Western Union Tel. Co. vs. Mayer, Treas., 28 O. S., 521.
Catoir vs. Watterson, 38 O. S., 319.

Upon this question the case of Beeson vs. Johns, 124 U. S., page 56 to page 60, is instructive. In that case it was shown that the lands of the plaintiff "were assessed and valued and equalized and taxed by the officers and authorities making such assessment and equalization and taxation at a higher price and value and at a higher rate of tax than the property and lands of resident owners of property and lands in the same township and county for the same year, and that all the other lands and property in said township, except the lands of non-residents of Iowa were assessed, equalized and taxed at a value and rate far below its actual cash value."

It was claimed that the assessment was void and was in fact no legal assessment of said lands and the proceeding based thereon and sale are void. The plaintiff was a non-resident land owner in said State. When the matter came before the Board of Equalization the record shows that full action was taken "on motion the Board proceeded to the equalization of assessments. A motion was made that all lands in the county assessed to unknown owners be assessed at $6.00 per acre, and an amendment was offered that said lands be assessed at $5.00 per acre, which motion carried."

The court in commenting upon this discrimination against unknown owners of land situated in said State (page 59) said:

"If a tax were levied under a law of the State which required either the assessment, or the rate levied upon that assessment, to be more favorable to the resident owners of the property than those who resided in another State, all assessments and sales under such a statute might possibly be declared to be void. But where the question relates to the action of a single assessor, or of a township or county board of equalization, and does not profess to be carried on with any purpose of making such discrimination, the mere errors in assessment *should be corrected by proceedings which the law allows before such sale* or before a deed is finally made, there is no sufficient evidence in this case of any purpose to discriminate

against the owners of lands in controversy, nor of any actual injury to him by the assessment which was made upon his property."

Under such circumstances a correction or abatement should have been applied for as provided by law. The assessment and levy were not void and for the correction of the error the remedy provided by law is ample for the complete protection of the taxpayer.

The remedy provided by Section 167, which was offered to the said plaintiff bank and rejected by it, is ample to correct all injustice, if any, that may have been done to the plaintiff, and that power existing must be applied to or the jurisdiction of this court cannot attach.

Again in the case of Stanley v. Supervisors of Albany, 121 U. S., page 535, the principle is again upheld by that court; but in that case the court forbid the action at law to recover the excess of taxes paid beyond what should have been levied on a just valuation in the following language:

"When the statutes of a state provide a board for the correction of errors and irregularities of assessors in the assessment of property for purposes of taxation, the official action of that body is judicial in character, and its judgments are not open to attack collaterally.

"*A party who feels himself aggrieved by overvaluation of his property for purposes of taxation, and does not resort to the tribunal created by the state for correction of errors in assessments before levy of the tax, cannot maintain an action at law to recover the excess of taxes paid beyond what should have been levied on a just valuation.*"

Upon this proposition we also cite the case of Hepburn vs. The School Directors, found in the 90th U. S. Reports, page 480, to 485.

By the statutes of the State of Pennsylvania, the tax assessed on moneyed capital in the hands of individuals is upon the par or nominal value; one of the questions presented there was when taxes were levied on national bank shares could they be taxed *at an amount above their par value;* this having been done the statute of Pennsylvania *provided that an appeal to the Auditor General could be made by the party aggrieved, who was authorized to inquire into the value and to correct any error which might appear.*

This Hepburn did not do, but undertook to appeal to the Federal courts for relief, (as in the case at bar). The Supreme Court of the U. S. held:

"What the amount of this share is, must, in some form, be ascertained in order to determine its taxable value. If the nominal or par value of the stock necessarily indicated this amount, there might be some propriety in making that the taxable value; but, as all know, such is not the case. The available moneyed capital belonging to a bank may be diminished by losses or increased by accumulated profit. Therefore some plan must be devised to ascertain what amount of money at interest is actually represented by a share of stock. The State of Pennsylvania has provided that this may be done by an official appraisement taking care to prevent abuses by declaring that such appraisement shall not be higher than the current market value of the stock at the place where the bank is located, and by giving an appeal to the Auditor General, who is authorized to inquire into the value and correct any errors that may appear. There certainly is no apparent injustice in this, it is not the amount of money invested which is wanted for taxation, but the amount of moneyed capital which the investment represents for the time being. * * * If a shareholder is not satisfied with the original appraisement, all he has to do is to appeal to the Auditor General, make known to him the actual condition of the affairs of the bank, and have the error, if any exist, corrected. *Hepburn did not see fit to avail himself of this right which he had. He preferred to rest upon his supposed right, under the act of Congress to limit the power of assessment to par value. This right, we think, he did not have.*"

It was said in the case of Chamberlain vs. Walker, decided March 13, 1894, by the C. C. U. S. for the district of South Carolina (60 Fed. Rep., 788) that the Federal courts cannot review the assessment made by the state officials simply on the ground that it is excessive, being the same point decided in Stanley v. Supervisors, 121 U. S., 549. Nor can it make a new assessment or direct another to be made, decided in the State Railroad Tax cases, 92 U. S. 615. Nor can such court interfere upon the ground that the tax is illegal, decided in Williams v. Supervisors, 122 U. S. 154 and in Lyon v. Alley, 130 U. S. 177. Nor can it interfere because the court would prefer, and would have adopted, a different system, decided in Western Union Tel. Co. v. Attorney General, 125 U. S.

533, and in Davenport Nat. Bank v. Davenport Board of Equalization, 123 U. S., 83.

The rule in all such cases, recognizes the supremacy of the State courts and tribunals for the settlement of all questions arising from the system adopted by the State for the raising of the revenues of the State, conceding of course that where a Federal Statute is violated, or the Federal Constitution intrenched upon, the right to have the same determined by a Federal tribunal. But in the determination of such questions, the *court will not search for a federal question* to sustain its jurisdiction, where it is apparent from the Record that the questions presented are such as should have been heard before a State Board, Tribunal or Court.

Smith vs. Adsit, 83 U. S., 185.

"So long as a State, by its laws prescribing the mode and subjects of taxation, does not intrench upon the legitimate authority of the Union, or violate any right recognized or secured by the Constitution of the United States, this court, as between the State and the citizen, can afford him no relief against State taxation, however unjust, oppressive or onerous" it may be.

Kirtland v. Hotchkiss, 100 U. S., 498.
Memphis Gas Light Co. v. Shelby Co., 109 U. S., 398.

"All these are questions for the State alone."

The Supreme Court of Ohio, in the foregoing cited cases, State ex rel. v. Leffler; and Jones v. Auditor, supra., having decided that the Board of Tax Revision has jurisdiction to grant the relief, if any, needed, to complainant bank, *such question of jurisdiction is not a federal question and cannot be considered here.*

"Whatever may have been the reason for the decision, whether the court had jurisdiction of the case or not, is a question exclusively for the judgment of the State Court."

83 U. S., 185-190.

Respectfully submitted,

J. M. Sheets, Attorney General.

P. H. Kaiser, County Solicitor, Cuyahoga County.
Smith W. Bennett, of Counsel.

Office Supreme Court U. S.
FILED
APR 25 1902
JAMES H. McKENNEY,
Clerk.

No. 227.

Sup. Ct. Brf. of Sheets for Appt.

# Supreme Court of the United States.

No. 227.

Filed April 25, 1902.

MARCELLUS A. LANDER, TREASURER, ETC.,
APPELLANT,

vs.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,
APPELLEE.

---

The case of New Orleans against Citizens Bank, 167 U. S., 371, cited and relied on by counsel for appellee, was a case where a charter had been granted to the bank. The charter thus granted could not be altered at the will of the legislature. In other words it was a contract. Not so in the case at bar. The statutes under which the appellee claimed the right to deduct debts from bank stock in the case of Whitbeck against Bank, 127 U. S., 193, might have been altered or repealed at the will of the law-making body, and that too without the consent of appellee. If these statutory provisions might have been altered or repealed without the consent of the appellee, it necessarily follows that the courts may change the construction heretofore placed on these statutes, and the bank must submit to the new construction.

If there are no contractual relations which would prohibit the law-making body from altering the law so as to take from

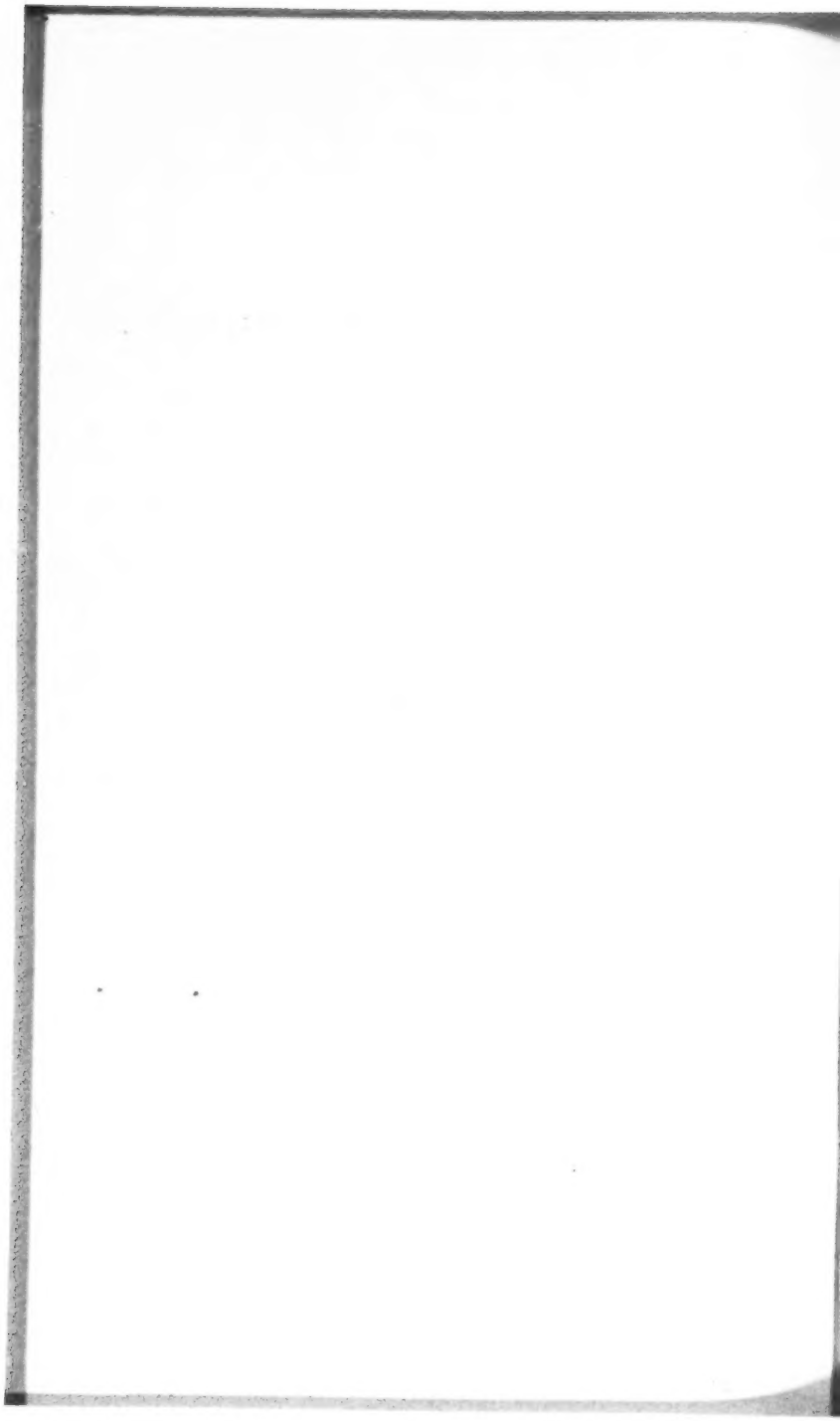
a person continuing advantages which he claims under a former decision, the courts also change their construction of the statutes so as to take away those same advantages. Suppose the statutes of Ohio had been properly interpreted in the Whitbeck case, and that after the decision in that case the legislature of Ohio had amended the statutes so as to read as they do now—so there would be no discrimination against national banks—the appellee could not continue, after such amendment, to deduct the debts of its share-holders from their stock in making its returns for taxation. A decision changing the construction placed by the courts upon a statute is similar in legal effect to an amendment of the statute by the legislature.

Douglass v. County of Pike, 101 U. S., 677, 687.

Respectfully submitted.

J. M. Sheets,
Attorney General of Ohio.

2000



20002

No. 227.

Brf. of Boynton for Appellees.

SUMMARY OF THE BRIEF.

Filed Mar. 15, 1902.


Page 1. Statement of the points discussed.

Pages 2-5. Statement of the action taken by the State Board of Equalization and the statutes applicable thereto.

Pages 5-9. The action taken by the State Board of Equalization void for want of notice.

Pages 9-13. What constitutes the former adjudication relied upon and why is it binding?

Pages 14-17. The facts as to the first adjudication: Whitbeck case.

Pages 17-18. The facts as to the second adjudication: Kimberley case.

Pages 18-20. The facts as to the third adjudication: Shields case.

Pages 21-31. The effect of a former adjudication:

(a.) As to any right, question or fact directly in issue.

(b.) As to the violation by state legislation of the restrictions prescribed by the Act of Congress for taxation of national bank shares, the legislation remaining the same.

(c.) As to the effect of the express adjudication that the same issue had been conclusively determined by prior adjudications.

# Supreme Court of the United Statse.

No. 227.

MARCELLUS A. LANDER, AS TREASURER OF CUYAHOGA COUNTY, OHIO, APPELLANT.

vs.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, APPELLEE.

BRIEF OF APPELLEE.

The question arising in the present case is, did the Circuit Court of Appeals err in reversing the judgment of the Circuit Court and remanding the cause to the latter court for further proceedings in accordance with the opinion of the Circuit Court of Appeals?

By its bill of complaint the appellee, The Mercantile National Bank of Cleveland, sought (1) to restrain the collection by the treasurer of Cuyahoga County, Ohio, of that portion of the taxes levied against its shareholders in 1897, upon the addition of $123,000 made to the valuation of its shares of stock by the State Board of Equalization for that year, on the ground that such addition was void because made without notice to the bank, or to any of its officers or stockholders named in the bill, on the ground that such stockholders was wrong; and further sought (2) to enjoin the collection of the tax of 1897 levied against shares of its stock held by certain individual stockholders named in the bill, on the ground that such stockholders were entitled, in fixing the valuation of their respective shares for taxation, to deduct their bona fide debts from such valuation; that to refuse such deduction would violate the provisions of section 5219 of the Revised Statutes of the United States which restricts the rate of taxation on shares of national banks to that assessed upon other moneyed capital in the hands of individual citizens of the state; alleging that under the facts set out the refusal to allow such deduction resulted in an unlawful and unjust discrimination against the shares of stock so held by them. The bill alleged that the shareholders aforesaid were entitled to such deduction on the further ground that their right

thereto had theretofore been adjudicated in their favor by the Circuit Court of the United States for the Northern District of Ohio, in causes between the bank and the treasurer of said County in which identically the same claim was asserted and in issue, as to the tax on their shares for the years 1886, 1887,1889 and1893, and that said adjudications are in full force and operation, and between the same parties, and involved the same subject matter.

The Circuit Court of Appeals decided both these questions in favor of the apellee, holding the addition of $123,000 to the valuation of the County Auditor without notice to the bank of the hearing at which the increase was made, was without authority of law and void; and on the second question, that the former judgment or decree of the Circuit Court rendered in the action brought in 1893 concluded the question of the right of the appellee's stockholders to a deduction of their bona fide debts in the assessment of the value of their shares for taxation.

We will discuss these two questions in the order here given. The conceded process by which bank shares are valued for taxation, in Ohio, is as follows: The cashier of the bank is required by the statute, section 2765, to make out and return to the auditor of the county in which the bank is located, between the first and second Monday of May, annually, a report in duplicate under oath, exhibiting in detail and under appropriate headings the resources and liabilities of such bank at the close of business on the Wednesday next preceding said second Monday, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each and the par value of each share. By the next section it is provided that the auditor, upon receiving such report, shall fix the total value of the shares of such banks according to their true value in money, and deduct from the aggregate sum so found, the value of the real estate included in the statement of resources as the same stands on the duplicate." Thereupon he is required to make out and transmit to the annual state board of equalization for incorporated banks, a copy of the report so made by the cashier, together with the valuation of such shares so by him fixed. The entire jurisdiction and power of the state board of equalization for banks are created by sections 2808-9-10, Revised Statutes of Ohio, which are as follows:

"Section 2808. The Governor, Auditor of State and Attorney General shall constitute a board for the equalization of the shares of incorporated banks, and for this purpose they shall meet on the third Tuesday of June, annually, at the office of the Auditor of State, and examine the returns of said banks to the county auditors, and the value of said shares as fixed by the county auditors as the same shall have been reported by the county auditors to the State Auditor."

"Section 2809. Said board shall hear complaints and equalize the value of said shares *according to the rules prescribed by this title for valuing and equalizing the values of real and personal property*, and if in the judgment of the board, or a majority of them, the aggregate value of all the bank property so reported to said board by the county auditors is below its true value in money, they may increase or diminish the value of said shares by such per cent. as will equalize said shares to their true value in money; provided that said board shall not

increase or reduce the grand aggregate value of bank shares as returned by the several county auditors by more than twenty (20) per centum."

"Section 2810. The Auditor of State shall, forthwith after such equalization shall have been made, certify to the auditors of the proper counties the valuation, as equalized, of the shares of banks situated in such counties, which valuation shall be put on the proper tax list."

Here it will be seen that the state board, composed of the Governor, Auditor of State and Attorney General, is required to meet on the third Tuesday of June annually, at the office of the Auditor of State and examine the returns of the banks to the county auditors, and the value of said shares as fixed by the county auditor as the same have been reported by the county auditors, and to hear complaints and equalize the value of said shares, "according to the rules prescribed by this title," (title 13 of the Revised Statutes of Ohio) "for valuing and equalizing the values of real and personal property."

According to the finding of the master and conceded state of facts, the board assembled on the day named in section 2808, namely, the third Tuesday of June, 1897. The following are the 7th and 8th findings of the master which cover the action of the state board complained of:

Seventh. That the said board of equalization for incorporated banks, composed of the Governor, Auditor of State and Attorney General, convened on the third Tuesday, being the 15th day of June, 1897, at the office of the State Auditor, as required by section 2808 Revised Statutes of Ohio, and organized by the election of the Governor as president of the board and G. W. Taylor, chief clerk, in the office of the Auditor of State, as secretary, and adjourned at the call of the secretary transacting no other business at that meeting; that the members composing said board next met on the 7th of September, 1897, but took no action relating to the valuation of the shares of the plaintiff, and adjourned; that two members of said board with said secretary met on the 10th day of September, 1897, but took no action relating to the bank shares of the plaintiff's bank, and adjourned; that on the 20th day of September, 1897, the members of said board met but took no action relating to the valuation of the shares of plaintiff and adjourned; that on the 4th day of December, 1897, the members of said board next met at the call of the State Auditor to consider unfinished business. The record of the meeting of said board as originally made by the secretary shows that at the meeting held June 15, 1897, the board "adjourned to meet at the call of the secretary." That at the meeting of September 7, 1897, September 10, 1897, September 20, 1897, the "board adjourned." At the meeting held December 4, 1897, the secretary was directed to amend the record as to each of said above-named adjournments by adding these words, "Amended to read, adjourned to meet at the call of the president of the board, Asa S. Bushnell, Governor of the State," and thereupon said board adjourned sine die. Some time after December 4, 1897, the record was amended by the secretary as directed by said board. At none of said adjournments was a day named for the next meeting.

Eighth. At said meeting on December 4, 1897, without complaint from any one, the members of said board assuming to act as a board, increased the valuation of the shares of the plaintiff from $519,320.00,

so fixed by the auditor, to $042,320.00, and on the sixth day of December certified said valuation to the auditor of Cuyahoga County, "to be by him placed on the treasurer's duplicate, which was accordingly done; that neither of said meetings of the members of said board following the third Tuesday of June, 1897, was called by said secretary; and no notice or information of any kind, or opportunity to be heard, was given by said board, its secretary or any other person to said bank or any of its officers, directors or shareholders of any or either of said meetings, except such as the statute gave them, to wit; section 2808 Revised Statutes and succeeding sections; nor did they or either of them have any notice of any of said meetings or appear thereat, and the first information that said bank or any of its shareholders had or received of any action of the board or of its purpose to increase the value of the shares so fixed by the auditor was on the 7th day of December, 1807, after the action of the board was had and such information was conveyed by letter from the auditor of the county to the cashier of the plaintiff, notifying him of the completed action of the board; that thereupon said bank and its shareholders through the officers and agents of the bank duly authorized, applied to the members of said board for a hearing, and were notified that two of the members of said board were out of the State, and that December 28th was as early as the bank officers could be received; that on said day the officers of said bank on behalf of said shareholders duly authorized, met the members of said board at Columbus, and made application for a hearing respecting the valuation of said shares and the action of said board, and notified said members of said board that such increase made on the shares of said bank was excessive and unwarranted, and protested against the same, but said hearing was denied, the members of said board declaring that the board had adjourned *sine die* and could not reconvene as a State board of equalization for banks to consider any claim or application respecting the value of said shares."

This finding shows that no notice whatever was given to the bank, or to any of its officers or stockholders, of the meeting at which the increase of the bank's valuation was made. This omission to give notice of the meeting of the board when action was to be taken, and was taken, we claim to be fatal to the action of the board in increasing the valuation fixed upon the shares by the county auditor. In the first place, "The rules prescribed by this title, (title 13) for valuing and equalizing the values of real and personal property" by which the board was bound, explicitly required notice to the property owner of the meeting at which the action of the board was to be had; and secondly, to deny notice of such a hearing and an opportunity to be heard, would be to deprive the owner of his property without due process of law.

Title 13 of the Revised Statute of Ohio embraces the sections from 2730 to 2915 inclusive. Section 2804 provides that the annual county board, "shall not increase or reduce the valuation of any real estate except in cases of gross inequality, and then only upon reasonable notice to all persons directly interested and an opportunity for a full hearing upon the question involved."

The same requirement is provided by the same section for the valuation of personal property. Section 2804a relates to the notice and

provides "that the notice provided for in section 2804 shall describe the real estate whose tax is to be acted upon by the description thereof in the tax duplicate in the current year."

Section 2707 gives to the boards power to hear complaints and to equalize the assessments of all personal property, moneys, credits, etc., with power to add to or deduct from the valuation of the same as returned by the assessor or county auditor upon such evidence as shall be satisfactory to said boards, provided "that no such addition shall be made to such list returned under oath without the board having first given reasonable notice to the person or persons whose personal property is sought to be added to, or the valuation thereof increased, to appear before said board at a time and place to be fixed by said board and show cause why such additions should not be made, or why such valuation should not be increased."

Section 2782 requires the county auditor to inquire into returns that he may suspect to be wrong, but in such cases provides that, "it shall be the duty of the auditor in all such cases to notify every such person before making the entry on the tax list and duplicate, that he may have an opportunity of showing that his statement or the return of the assessor was correct."

From these provisions the duty of the state board of equalization for bank shares to give notice of its meetings when the time thereof has not been fixed at the date of the adjournment, is perfectly obvious. Without such notice the board had not the slightest jurisdiction to proceed to increase the valuation of bank shares. To do so without such notice would not only deprive the tax payer of his property without due process of law, but would be in express violation of the provision of the statute requiring notice to be given to the property owner. In *Champaign County* vs. *Smith*, 7 O. S. 42, the Supreme Court of Ohio, giving construction to the clause above quoted from section 2782 of the Revised Statutes held: "That the tax cannot be increased without first giving notice to the party and affording him an opportunity of showing that the previous valuation was correct."

Judge Scott, in delivering the opinion of the court on this point, says:

"We cannot regard the provision of the statute requiring notice as directory merely. It is not a matter of form only, but of substance. Where a statement of property subject to taxation has been made out and verified by the oath of the party and returned to the proper office.....it cannot be that the legislature intended to put it in the power of the Auditor to increase this amount without notice to the party interested. We apprehend the provisions of the statute as to the issuing and service of a summons to bring a defendant into court in a civil action, are not simply directory, and that a substantial compliance with them is essential to the validity of the subsequent judgment. But the assessment of the tax affects as vitally the rights and interests of the party assessed as the rendition of a judgment against him. Indeed, the collection of the former is much more summary in its mode under the law of 1853 than the ordinary process of execution upon the latter. The language of the statute is: "It shall be the duty of the Auditor in all such cases to notify every such person before making the entry upon the duplicate that he may have an opportunity of showing

that his statement or the return of the assessor was correct. 'Until this notice be given the auditor has *no jurisdicton* of the party, and can, therefore, make no valid assessment against him, however perfect and full may be his jurisdiction of the subject matter. The party interested has a clear right to a hearing and a day in court, as well by the express terms of the statute as by the plainest principles of justice.'"

This being the construction given by the Suprene Court of the State to a State statute, if not controlling here, is of great weight upon the question decided.

In *Windsor* vs. *McVeigh*, 93 U. S. 274, the court speaking through Mr. Justice Field, after quoting from *McVeigh* vs. *United States*, 11 Wall., 259, the expression of Justice Swayne that it would be contrary to the first principles of the social compact and of the right administration of justice to give judgment without hearing, said:

"The principle stated in this terse language lies at the foundation of all well ordered systems of jurisprudence. Whenever one is assailed in his person or his property there he may defend, for the liability and the right are inseparable. This is a principle of natural justice recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."..... and "denial to the party of the benefit of the notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether."

Speaking of this decision, this court in *Hovey* vs. *Elliot*, 167 U. S. p. 415, by Mr. Justice White, said:

"This language but expresses the most elementary conception of the judicial function."

In *Rees* vs. *City of Watertown*, 19 Wall., 107 the court say:

"Whether in fact the individual has a defence, is not important. To assume that he has none, and therefore, that he is not entitled to a day in court, is to assume against him the very point he may wish to contest."

This language was quoted with approval in *Louisville & Nashville Ry. Co. vs. Schmidt*, 177 U. S. 239. So in *Simon* vs. *Craft*, 182 U. S. 427, it was said at page 437:

"*If the essential requisites of full notice and an opportunity to defend*, were present, this court will accept the interpretation given by the state court as to the regularity under the state statute of the practice pursued in the particular case."

The action of the State Board of Equalization for banks complained of, was before the Circuit Court of the Eighth Ohio Circuit in the cases brought by the state banks to enjoin the tax on the increase of valuation of their shares without notice at this very December 4th meeting, and the tax was enjoined for want of jurisdiction by the board to increase the valuation, the same having been done without notice to the bank. The judgment of the court was so satisfactory that the cases went no further, although there were thirteen of them. *Euclid Avenue Savings & Banking Co.* vs. *Hubbard, Treasurer*, 22 Ohio Circ. Ct. 20.

We refer the court to the case of *Perkins* vs. *Zumstein, Treas.*, 4 *Ohio* Circ. Ct. 371, and *Britt* vs. *Hagerty, Auditor,* 11 Ohio Circ. Ct. 115, where it was held:

"That a board of review cannot make any addition to the taxable value of real estate until the owner has been served with a notice of its intention so to do, and the statutory requirements for service must be strictly pursued."

In these cases the treasurer was enjoined from collecting the tax assessed on the addition of the board of review. Notwithstanding the question seems thoroughly settled by the foregoing adjudications, that the state board of equalization for banks at its meeting on the 4th of December, 1897, had no jurisdiction to act, having given no notice to the bank, we refer to other adjudications and elementary authorities for the purpose of showing that the principle underlying these decisions, denying jurisdiction to the board to act without notice, is of universal application.

In section 114 of *Desty* on *Taxation*, the author says:

"The sessions of the board must be held at the time and place appointed by statute, when they may examine the owners of property under oath, and may make such additions of omitted property as justice may demand, but not without affording to the tax payer an opportunity to be heard, and giving him the notice to appear before the board."

In *State* vs. *Harrison*, 39 N. J. L., 55, it was held:

Statutory provisions to secure notice to individuals, whose rights are to be affected, must be strictly complied with. In the absence of the requisite notice, proceedings of this character cannot be upheld."

And it can make no difference whether the notice is required by the statute, or whether it is required by the common law. In our case it is required by both.

In *Commissioners* vs. *N. Y. Mining Company*, 76 Md., 551, the court held:

"Until the property owner is duly notified and given an opportunity to be heard on the valuation, the board *has no power or authority to increase the valuation of the property already valued.*

In *Slaughter* vs. *Louisville*, 89 Ky., 112, held:

"Where the board failed to meet as required by law, the increase is invalid."

It certainly can make no difference whether the board failed to meet on the third Tuesday of June, or whether meeting that day they indefinitely adjourned without taking action, and took that action upon a day of which the owner of the property was not notified.

In *Cooley on Taxation*, page 365, the author says:

"Whatever statutory provisions are made for notice and hearing must be regarded, under the rules of construction already given, as mandatory. A compliance with them in all essential particulars should, therefore, be held a condition precedent to any further proceedings. It is not enough to sustain a tax under such circumstances that the officers *have acted with just intent*, or even that the assessment is *relatively fair*, the conclusive answer to any suggestion of the kind is, that the party has been denied his lawful right to meet such a claim at the proper time."

"When, therefore, either directly by the statute or by some officer or board under its authority, a certain time is fixed for a meeting of a Board of Review, and the board fails to meet, or a certain time for the return and filing of the assessment for the inspection before the meeting of the board and it is not filed, whereby inspection is lost, the tax proceedings must be regarded as having failed to become effectual because of the failure of the officers to properly follow them up as required by law. *No argument can be admissible in such case which proposes the acceptance of something as a substitute for the securities the statute provides.*"

While the author is speaking of failure to meet, the rule, *ex necessitate*, is the same, where they meet upon an appointed day and take no action relative to the increase, and adjourn without day, giving no notice of the day on which they take their final action. In the present case we particularly complain of the failure to give us notice of the meeting on the 4th day of December, that being the day on which they took the action relating to the appellee. We care very little about the three September meetings, although we had no notice of them, because they did not affect us by any action the board took. But on the 4th of December it took action, and intended to take it, because their record shows that they called the board together to dispose of unfinished business, and the unfinished business related to nearly all the banks of the State, and particularly to the Cleveland banks. And knowing that they were to take up the valuation of the Cleveland banks on that day, notice of that meeting was especially required before its action could bind.

In *Burrows on Taxation*, 237, it said:

"Boards of equalization are vested with special powers, and their record must show all facts necessary to give jurisdiction."

In the present case the record not only fails to show facts necessary to give jurisdiction over the bank on the 4th of December, 1897, but the testimony conclusively shows that they did not have jurisdiction.

In a note at page 422 it is said:

"If a Board of Equalization raises the assessment without jurisdiction, *its action is void.*"

At page 751, *Burrows on Taxation*, it is said:

"If the board by law is required to meet at a certain specified time, and it meets at another at which the tax payers have neither actual nor constructive notice to appear, its action at such time *is unauthorized and void.* And so it will be if the statute requires notice to be given of its meetings, and the records of the board show no notice."

In *Jewel* vs. *Van Steenburgh*, 58 N. Y., 85, in the discussion of the question as to whether notice was essential to jurisdiction, the Court say:

"It seems to me *clear that it is.* This is the only mode by which persons interested can have an opportunity to be heard. It is in the nature of process to bring them into court, and it must precede the power of the trustees to act upon the subject. In the first instance the assessors may exercise their own judgment as to who are taxable persons and the kind and value of the property to be taxed; but this is preliminary to the final adjudication. Before that can be

made, the persons to be taxed are to have a hearing and it cannot be made until an opportunity for such hearing is afforded. As well might a justice of the peace render judgment against a party without the service of process."

In *Lewis* vs. *Bishop* (Wash.) 53 Pac. Rep., 165 where objection was made to the granting of the relief on the ground that it did not appear, nor was it claimed, that the property in question was assessed at a higher rate than adjoining property, the Court say:

"The statute in accord with the spirit of the constitution contemplates that the property owner shall have the right to be heard before the value of his property, as fixed by the assessor, is raised, and it is not a justification of the action of the Board of Equalization in raising the assessment without notice, that the conclusion reached by them was fair and accords with substantial justice."

In the light of the above cases, aside from the statute, the action of the State Board of Equalization for bank shares on December 4, 1897, was clearly void. The meeting was not only without notice to the bank or its shareholders, but was held behind closed doors long after both bank and its stockholders had the right to assume and believe that the duplicate was in the hands of the treasurer and the taxes levied for the current year being collected. Section 1042 of the Revised Statutes of Ohio provides:

"That the auditor shall annually before the first day of November, deliver to the county treasurer a true copy or duplicate of the books containing the tax list required to be made by him for the year."

The bank had the right to presume that the duplicate was in the hands of the treasurer for collection long before December 4th. A hearing upon application duly made was denied. We could not obtain a hearing to make application to have the matter opened until the 28th day of December, eight days after the first half of the taxes for the year was required by the statute to be paid, the statute requiring the first half of the taxes in Ohio to be paid on or before December 20 and the remaining half on or before June 20, following. The action of the State Board of Equalization was at best a slovenly performance of official duty materially affecting the rights of another without giving that opportunity to be heard which the law requires in all cases.

## II.

## RES ADJUDICATA.

The second question is, did the Circuit Court of Appeals err in holding that a former adjudication established the right of the bank shareholders to deduct their legal bona fide debts from the value of the shares in determining the amount for which the shares should be listed for taxation. The Court held that the judgment of the Circuit Court in 1893 in the case of the present appellee *National Bank* vs. *Joseph C. Shields*, treasurer, estopped the defendant from denying the right of the shareholders to the deduction claimed; but expressed the opinion, that, the judgment in the case of the *apellee* vs. *Whitbeck*, decided in 1887, created no estoppel. Respecting the

adjudication in 1887 between the appellee and Whitbeck, treasurer, the learned Circuit Court of Appeals fell into a vital error; and while it is not necessary for us in maintaining our right to the judgment given, to question the court's reasoning upon the effect of the judgment in the Whitbeck case, the conclusion reached is so far unsupported by the actual facts, and so far arises out of a misconception of what judgment creates the estoppel where one arises, as to justify a re-statement of the facts bearing upon the point as they were presented to this court when the Whitbeck case was decided. The Circuit Court of Appeals assumed that the decision of *this* court in *Whitbeck* vs. *The Mercantile National Bank*, 127 U. S. 193, affirming the judgment of the Circuit Court, was the adjudication relied on, and to be relied on, as establishing the estoppel claimed to arise from the judgment in that case, and as a predicate for denying the estoppel, the court said that this court in the Whitbeck case decided a proposition not made in the bill, and not set forth in the certificate of division. It is our purpose here to show that this statement is wholly incorrect, leaving the effect of that judgment for consideration in connection with the judgment in the later cases involving the same question. In speaking of the Whitbeck case the Court say: (Record p. 465.)

"The question made in the bill was, whether the deduction of indebtedness from a limited class of capital as defined in the Ohio Statute was an unlawful discrimination. The proposition decided by the Supreme Court was, assuming the Ohio Statute to be different from what the bill declared it to be, and that it provided that moneyed capital, with the single exception of national bank shares, might have such deduction, it afforded an unlawful discrimination against such shareholders within the meaning of the Federal statute. In other words, the Supreme Court decided the question upon an erroneous assumption, not based on the allegations in the bill of complaint or certified in the questions submitted. The general decree in favor of the bank in that case can be supported by the unlawful discrimination in the increased valuation of the shares of the bank. The real question made under the statutes of Ohio, as they in fact existed, was not passed upon by the Supreme Court of the United States in that case. We think we have a right to look to the opinion to ascertain what was decided by the Supreme Court. Closing the same Mr. Justice Miller says: "These principles require the affirmance of the decree of the circuit court; and while there will be found in them a sufficient answer to the questions certified by the judges of that court, we do not think it necessary to make a more specific answer to each of them. The decree is affirmed."

"The decree could stand under the finding, in favor of the bank upon the other proposition. We think the Supreme Court has decided a proposition not made in the bill, and not set forth in the certificate of division of opinion. While it is said in that certificate that the laws of Ohio make no provision for deduction of debts by shareholders of national banks, there is no statement that such holders are the only owners of money capital not entitled to such deduction."

The court then quoting from *Bank* vs. *Chapman*, 173 U. S. 219, among other things the expression, that in the Whitbeck case "the Court assumed that under the statute of Ohio owners of all moneyed capital other than shares in a national bank were permitted to deduct their bona fide indebtedness from the value of their moneyed capital."

Concluded by saying:

"In view of the foregoing comments on the decision in the Whitbeck case, and the erroneous assumption therein of the character of the Ohio statute, we are not prepared to say that the judgment of that case was *res adjudicata* as to the rights of complainant stockholders to deduct their debts from the shares of national bank stock."

That this conclusion was founded on a misconception of what record and judgment constituted the estoppel respecting the thing adjudicated, we shall show hereafter. The court was utterly wrong in the position that this court assumed in deciding the Whitbeck case that under the Ohio statute the owners of all moneyed capital other than shares in a national bank, were permitted to deduct their bona fide debts from the value of their moneyed capital. There not only is nothing in the opinion of Mr. Justice Miller showing such assumption, but to make such assumption would subject the court to the imputation of deciding a question depending on the construction of a state statute without having that statute before it. More than this, it would also subject counsel on both sides to the imputation of presenting a case to the court for decision involving the construction of a statute without placing that statute before it. To show that the fact was exactly the opposite of what is intimated, we reproduce the section as printed in the brief of Whitbeck for the purpose of showing not only that the statute was before the court, but that the moneyed capital from which the debts may be deducted was therein defined as *credits*, and that the same section defined all other moneyed capital subject to taxation from which there was no claim that deductions were allowable, and from which it was perfectly obvious deductions were not provided for. The following is the section found on page 36 of the brief of Whitbeck:

Sec. 2730.....the terms, "investments in bonds" shall be held to mean and include all moneys in bonds, or certificates of indebtedness, or other evidence of indebtedness of whatever kind, whether issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, states, or other incorporations, or by the United States, held by persons residing in this state,.....; the terms "investments in stocks," shall be held to mean and include all moneys invested in the capital or stock of any association, corporation, joint company, or other company, the capital stock of which is or may be divided into shares, which are transferable by each owner without the consent of the other partners or stockholders, for the taxation of which no special provision is made by law, held by persons residing in this state.....; the terms "personal property" shall be held to mean and include, first, every tangible thing the subject of ownership, whether animate or inanimate, other than money, and not forming part of any parcel of real property, as hereinbefore defined; second, the capital stock, undivided profits, and all other means not forming

part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion, or interest in such stock, profits, or means, by whatsoever name the same may be designated.....; third, the money loaned on pledge or mortgage of real estate, although a deed or other instrument may be given for the same, if between the parties the same is considered as security merely; the term "money" or "moneys" shall be held to mean and include any surplus or undivided profits held by societies for savings or banks having no capital stock, gold and silver coin, bank notes of solvent banks, in actual possession, and every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw, in money on demand; the term, "credits" shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this state, other than such as are held to be money, as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money) *over and above the sum of legal bona fide debts owing by such person;*.....and no person shall be required to take into account in making up the amount of credits, a greater portion of any credits than he believes will be received or can be collected, or any greater portion of any obligation given to secure the payment of rent than the amount that shall have accrued on any lease and remain unpaid:....."

In this section the court had before it in the Whitbeck case, the entire legislation of the state defining moneyed capital subject to taxation, explicitly showing that debts could not be taken from investments in bonds, corporate or municipal, certificates of indebtedness by corporate bodies, nor from investments in stocks. To say that the court assumed that debts could be taken from all moneyed capital is to say that it did not familiarize itself with the very statute on which the point to be decided turned, having that statute before it, with a thorough argument upon the question by counsel. Moreover, the very question certified, contained the information that debts could only be taken from what the statute denominated credits. The court could not have answered the certified question relating to the deduction of debts from the value of the shares without reading the section, and it could not read the section without discovering, at once, that legal *bona fide* debts could not be taken from investments in bonds or stocks. These facts ought to be regarded as satisfactorily demonstrating that the court did not overlook the statute.

But, aside from this, the learned Circuit Court of Appeals seems to have entertained the notion that the decision of this court in the Whitbeck case on the question certified up for decision, was the adjudication to be relied on as creating the estoppel as to the thing adjudged. This clearly is a misconception of the record and judgment that create the estoppel.

The binding judgment—the one creating the estoppel is the one rendered in and by the Circuit Court—the judgment pronounced on the facts found. The Federal statute provides that where the Circuit and District judges differ on a question before them, where both sit at the trial in the Circuit Court, effect shall be given to the judgment of the

Circuit Court judge. The Circuit Court entry in the Whitbeck case found all the allegations of the petition to be true and carried that finding into the decree, (Record p. 65) and the decree was entered at the conclusion of the trial long before the hearing by this court on the certified questions. That judgment has never been disturbed. The judgment of affirmance by this court added nothing to its efficacy or effect, nor did it take anything from it. Unless the judgment of the Circuit Court is reversed it stands in full force. The party against whom the judgment is given below is the appellant, or plaintiff in error, the actor, moving the reviewing court to reverse the judgment, and if he fails, as was said by Chief Justice Taney, in *Brown* vs. *Ashen*, 14 How. 28, "The judgment or decree necessarily stands;" the judgment already of record. In *Durant* vs. *Essex Company*, 7 Wall 107-112, the court, speaking by Mr. Justice Field, said:

"In cases of appeal or writ of error in this court, the appellant, or plaintiff in error, is always the moving party. It is affirmative action which he asks. The question presented is, shall the judgment or decree be reversed? If the judges are divided the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force. It is, indeed, the settled practice in such cases to enter a judgment of affirmance. But this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that court can proceed to enforce *its* judgment. The legal effect would be the same, if the appeal, or writ of error, were dismissed."

The principle here stated is decisive of the question that the judgment of the Circuit Court was the one that carried into adjudication the ground or fact upon which recovery was had. It is now uniformly held, where the issues are made by the pleadings, that the question is, what did the court in effect decide as shown by the record and judgment? *Potter* vs. *Wagner*, 36 O. S. 47, and this necessarily means the judgment of the court pronouncing the decree—the court that hears the evidence and ascertains the facts and carries them into judgment. It is the verdict or finding with the judgment of the court upon it, which constitutes the *res adjudicata*. Wells on *Res Adjudicata*, 296.

This is so firmly settled as the doctrine of estoppel by judgment, and so incontrovertible in principle, that no elaboration can make it plainer. Consequently, disregarding the judgment in the Whitbeck case as rendered in the Circuit Court on the grounds stated by the learned Circuit Court of Appeals, was, we respectfully submit, to overlook its binding effect as a judgment of the Circuit Court, covering all the allegations made by the bill. It was entirely inadmissible to predicate any ruling on the decision of this court in the Whitbeck case, in reaching the determination of what passed *in rem judicatam* by the decree of the Circuit Court in that case. While, as before stated it is not necessary to the maintenance of the correctness of the final judgment of the Circuit Court of Appeals for us to rely on the decree in the Whitbeck case, we insist that that decree is to be treated as if no appeal had been taken therefrom to this court, and further, that its affirmance left it with all the vigor and effect it had when entered by the Circuit Court.

## III.

## THE FORMER ISSUES.

We confidently claim that each of the decrees of the Circuit Court for the Northern District of Ohio in the cases of the present appellee against Whitbeck, Treasurer, (Record p. 184-210, 1888), and the present appellee against Kimberley, Treasurer, Record p. 241-245, 1889), and the present appellee against Shields, Treasurer, (Record p. 246-257 inclusive, 1893) is decisive of the correctness of the judgment of the Circuit Court of Appeals, that the appellee was entitled to the relief prayed for. In each of these cases the question of the right of the shareholders of the bank to deduct their bona fide indebtedness from the value of their shares, was directly involved and was decided in favor of the complainant. In the last or Shields case, the only question involved was the right to the deduction. In the first, the Whitbeck case, and the last, the Shields case, the court found all the allegations of the bill to be true, and gave judgment accordingly. In the second, or Kimberley case, the court specifically found (Record 245) that the shareholders were entitled to deduct their legal bona fide debts from the value of their shares and enjoined the collection of the tax on the amount equaling the indebtedness.

### THE WHITBECK CASE.—JUDGMENT, RECORD P. 206.

In the first, or Whitbeck case, the bill was demurred to and the demurrer overruled. The treasurer then filed an answer taking issue with every material allegation in the complaint. In the bill of complaint it was, *inter alia*, averred:

"That in and by the act of Congress under which your orator is incorporated, the right of the state to tax any owners of its shares is made subject to the condition that the taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the said state." That by section 2730 of the Revised Statutes of Ohio it is enacted that, "The term 'credits' shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or services due to or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this state other than such as are held to be money as hereinbefore defined when added together—estimating every such claim or demand at its true value in money—over and above the sum of legal bona fide debts owing by such person."

"That the laws of Ohio authorize and permit the owner of credits to deduct therefrom all debts owing by him and required him to list for

taxation only the excess of credits over his indebtedness, and that such is the uniform practice throughout the state, and that under the laws of the same state the owner of capital stock of your orator is denied the right to deduct therefrom his indebtedness, but he is required to list for taxation the whole number of shares owned by him, and not simply the excess of the value of said shares over his indebtedness, and your orator insists that such discrimination results in the taxation of your orator's stock at a much greater rate than is assessed upon other moneyed capital in the hands of individual citizens of Ohio."

Also that,

"A large amount of moneyed capital in the hands of individuals invested in promissory notes and other obligations and credits is by the aforesaid provision allowing deduction of legal bona fide debts to be made therefrom, expressly exempted from taxation, thereby making an unjust and unlawful discrimination against moneyed capital invested in national bank shares as to which no exception or deduction is provided for by the laws of the state, which discrimination is in direct violation of the restriction of said section 5219 of the Revised Statutes of the United States."

The bill after setting out the names of certain stockholders who claimed the right to deduct their *bona fide* debts from the value of their shares, further averred:

"That each of said above named shareholders was indebted and owing to others of legal *bona fide* debts, a sum in excess of the credits from which under the laws of Ohio he was entitled to deduct said debts to an amount equal to the value of said shares * * * which said excess of said debts over credits as aforesaid should be deducted from the assessed value of said shares so owned by him, and by reason of the facts above stated said shares of said stock should not have been placed on the tax duplicate, and no tax should have been assessed thereon * * * and your orator insists that by reason of the premises above set forth there should be deducted from the shares of capital stock owned by said shareholders above named and now standing on the tax duplicate of said county, $285,500, par value of the shares of said stock, in all the sum of $141,543.48, according to the assessed value thereof."

In the answer, besides the general denial, special denials were as follows:

"He (defendant) denies that any of the shareholders of said banking association at the times named in the said bill of complaint was indebted or owing to others of *bona fide* debts a sum in excess of the credits from which under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares or any part thereof. He denies that either of said shareholders was then indebted in any sum whatever, *or that even if any of them was so indebted as claimed in said bill of complaint, he is thereby entitled to deduct the excess of such indebtedness over his credits from the assessed value of his said shares*, or that for any reason said shares of stock should not have been placed on the tax duplicate and no tax assessed thereon. * * * He denies *that any sum whatever should be deducted from the valuation of the shares of the capital stock owned by said shareholders named in said bill of complaint.* He denies that the laws of

Ohio authorize and permit the owner of credits to deduct therefrom all debts owing by him or that such is the uniform practice throughout the state. He denies that the taxation of shares of said complainant's stock is at a much or any greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state. He denies that the necessary effect of the proceedings had in the assessment and levy of the tax standing against said complainant and the shares thereof owned by its said shareholders has been to deprive said complainant or said shareholders * * * of any security provided for them by the limitation of said Act of Congress."

Then follows a denial of each and every allegation in said bill of complaint "not hereinbefore admitted or expressly denied."

Under this issue the question of the right to deduction of indebtedness from the value of the shares was referred to a master under the following order:

"In this cause it is ordered that A. J. Ricks, because of his experience in matters of accounting, be appointed a special master to examine the evidence, and record, now on file, and report who, if any, of the shareholders of the complainant on the day preceding the second Monday of April, 1885, had *bona fide* indebtedness which should have been deducted from the valuation of the shares."

The Master reported as follows:

"By an order entered in this case the undersigned was appointed a special master to ascertain and report from the testimony and record who, if any, of the shareholders of the complainant on the day preceding the second Monday of April, 1885, had *bona fide* indebtedness which should have been deducted from the valuation of the shares of the capital stock of complainant bank. The master reports that, having examined the evidence and heard the claims of counsel, he *finds* and *reports* that all the shareholders *are entitled to deductions as charged in the bill*, except the following who should be taxed for the amount stated, viz: E. R. Perkins has credits subject to taxation, above his indebtedness on the day named to the sum of $4,374.40. C. L. Murfey has credits, subject to taxation, above his indebtedness on the day named to the sum of $724.00. Robert L. Chamberlain has credits, subject to taxation, above his indebtedness on the day named to the sum of $4,448.00. James Parmelee has credits, subject to taxation, above his indebtedness on the day named to the sum of $3,113.60. James Barnett has credits, subject to taxation, above his indebtedness on the day named to the sum of $17,792.00.

"All of which is respectfully submitted."

The case then came on for final hearing and the following decree was given upon the merits:

"At this term the parties appeared by their solicitors, and this cause came on for hearing upon the merits, and the court being fully advised in the premises from the testimony and exhibits and special master's report adduced in open court, *do find all the allegations of the bill to be true*, except those allegations which charge that James A. Barnett, Robert L. Chamberlain and James Parmelee were the owners of shares of capital stock of said bank from which they were entitled to deduct, respectively, an indebtedness of theirs, which allegations the court find are untrue; and it appearing to the court that the amount admitted in

said bill to be due to said respondent has, pursuant to a former order of this court, been paid by said complainant to said respondent and by him received; it is therefore ordered, adjudged and decreed that said respondent and his successors in office be forever enjoined from proceeding or attempting to collect or from collecting any part or portion of said tax or assessment remaining unpaid, except the taxes levied upon the valuation of the shares of capital stock of the complainant, as fixed by the County Auditor, owned by said Barnett, Chamberlain and Parmelee, amounting to $659.20, the amount of tax hereby enjoined being $3,967.55; and it is therefore ordered, adjudged and decreed that said respondent or his successors in office, pay the costs in this suit, to be taxed at $183.47, for which it is ordered that execution may issue as upon judgments at law."

On two principal questions a certificate of division was made for the opinion of this court (Record p. 209). The one relating to the right to deduction of debts from the value of the shares was as follows:

"Whether the taxation of national bank shares in the state of Ohio in the year 1885 without permitting the shareholder to deduct from the assessed value of his shares the amount of his *bona fide* indebtedness existing on the Wednesday next preceding the second Monday in May in 1885, and on the day preceding the second Monday in April, 1885, is a discrimination forbidden by the Act of Congress. The said shareholder not having deducted said *bona fide* indebtedness from any CREDITS owned by him at either of said dates."

In the brief of counsel for Whitbeck, treasurer, page 36, the proposition was stated as follows:

2nd. Under the laws of the United States and the constitution and statutes of Ohio may a stockholder in a national bank deduct from the assessed value of his shares the amount of his *bona fide* indebtedness?

## THE MERCANTILE NATIONAL BANK vs. KIMBERLEY, TREASURER.

JUDGMENT—SEPTEMBER 28, 1889.

Record, p. 245.

In the second case, the Mercantile National Bank vs. Kimberley (Record p. 234-245), it was declared by the bill that the owners of shares therein named, with the amount of their shares given, made due proof to the listing and taxing officers of the city and county, that they were indebted respectively in legal *bona fide* debts in an amount exceeding the value of said shares in excess of their credits from which any portion of said indebtedness was or could have been deducted or taken under the laws of the state The bank further averred, "that the

laws of Ohio authorize and permit the owner of credits to deduct therefrom all debts owing by him, and requires him to list for taxation only the excess of credits over his indebtedness, and that such is the uniform practice throughout the state, and that under the laws of said state the owner of capital stock of your orator, is denied the right to deduct therefrom his indebtedness, but is required to list for taxation the whole number of shares owned by him, and not simply the excess value of such shares over his indebtedness, and your orator insists that such discrimination results in the taxation of your orator's stock at a much greater rate than is assessed other moneyed capital in the hands of individual citizens of the state."

The bill further averred that both said auditor and said state board of equalization refused and omitted to decrease the value of said shares by reason of said claims for deduction and thereby wholly refused to regard said Act of Congress allowing said deduction to be made. The answer of the treasurer denied all the allegations of the bill except those specifically admitted to be true. The following judgment was given on the right of the shareholders to the deductions under the issue made affirming and denying the right (Record p. 245).

"The court further find that there should be deducted from said first valuation the sum of $169,235, being the amount on which the particular shareholders named in said bill of complaint are not taxable, the same being less in amount and value than their *bona fide* debts from which they are entitled to have the same deducted, leaving the sum of $380,670, which is hereby declared to be the true valuation of the shares of said bank taxable under the Act of Congress, for said year, 1888."

Then followed the judgment enjoining the treasurer from collecting or attempting to collect any portion of said excessive tax. A similar finding and judgment was made and given against the same treasurer in favor of the complainant for the taxes of 1886, upon like allegations put in issue by answer, (Record p. 211-230, 1888.)

## THE MERCANTILE NATIONAL BANK vs. SHIELDS, TREASURER.

Record p. 256.

In the third of the above cases, the bank against Shields, treasurer, (Record p. 246-256) the bill declared:

(Record p. 247) that "both said Auditor and said State Board of Equalization did fix and establish a much higher valuation for taxation upon and for the shares of capital stock of the complainant than upon other moneyed capital in the hands of individual citizens of the state, by refusing and disallowing any deduction of the *bona*

*fide* indebtedness of said shareholders of said capital stock from the valuation of said shares so fixed for taxation, as is allowed to individual and other citizens of the state on moneyed capital invested in *credits* hereinafter defined." The complainant further averred that by section 2730 of the Revised Statutes of Ohio it was enacted, "that the term credits shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the persons liable to pay taxes thereon, including deposits in banks, or with persons in or out of this state other than such as are held to be money as hereinafter defined when added together, estimating every claim or demand at its true value in money—over and above the sum of legal *bona fide* debts owing by such person."

The bill further averred that a large amount of moneyed capital in the hands of individual citizens of the state and of said county of Cuyahoga, in the City of Cleveland, invested in promissory notes and other legal obligations, securities, claims and demands, is by the aforesaid provision, allowing a deduction of legal *bona fide* debts to be made therefrom, expressly exempted from taxation, thereby making an unjust and unlawful discrimination against moneyed capital invested in national bank shares as to which no exemptions or deduction is provided for by the laws of the state, which discrimination is in direct violation of the restrictions of said section 5219 of the Revised Statutes of the United States, which provides that, "the taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such state."

The bill then set out the names with the number of shares held by certain shareholders, valued at $149,340, and further averred that at the time of the return, each of the above named shareholders was indebted and owing to others of legal bona fide debts, a sum in excess of the credits from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the par value of said shares, which said excess of debts over credits as aforesaid, "the said shareholders above named are entitled to have deducted from the assessed value of said shares so severally owned by them."

The bill then shows that the auditor of the county in making the duplicate for the year 1892, did deduct and abate said indebtedness of the several shareholders from the assessed value of the shares so owned by them respectively, but that afterwards, he reconsidered and reversed his action, and wrongfully added to the duplicate against the said shareholders, the entire amount of said deduction on the professed claim that such deductions were improperly allowed under the laws of said states, and assessed against the same, the rate and percentage of taxation fixed for said city, county and state for 1892, and entered the same on said duplicate, and "said defendant threatens and is about to collect by distraint or otherwise, the said taxes on said shares of stock with said deductions disallowed."

In addition to the forgoing averments a former adjudication of the right of the shareholders to the deduction claimed, is pleaded, the bill, (Record p. 250) setting out a former adjudication of the question or right of the shareholders to the deduction by the following averments:

"The complainant further avers that heretofore, to-wit, at a date prior to the April term of this court, in the year 1887, the complainant brought suit against Horatio N. Whitbeck, as treasurer of said Cuyahoga County, who then held such office, to enjoin the collection of the excessive taxation of shares of said complainant, growing out of the refusal of the taxing officers of said county to allow the deduction of *bona fide* debts of stockholders from the assessed value of said shares, said Whitbeck then representing the same interest, sustaining the same relation and charged with the same duties to the public as does the present defendant; and in said suit this complainant alleged by its bill the refusal by the auditor of said county to allow a deduction of *bona fide* debts of the shareholders from the value of shares of stock of said complainant owned in large part by the same stockholders as those above named, and in which action said treasurer of said county, admitting said refusal to allow said deduction so joined issue as to present the question of the right of said owner of said shares, to said deduction in view of the laws of Ohio, the said laws being the same as the present laws of the State and those under which the taxing officers of the said county acted in 1892 and 1893, in making assessments and in refusing deduction to be made of *bona fide* debts of stockholders from the valuation of said shares; and the complainant says that upon the issue so joined the said court at its April term, A. D. 1887, held and determined that said shareholders were by law entitled to said deduction of *bona fide* debts from the value of their said shares, to an equal amount fixed for taxation; and in said action the court gave judgment perpetually enjoining said treasurer from collecting or attempting to collect any tax or assessment on the valuation of said shares to an amount equal to said debts from which said deduction was sought to be made, and disallowed by the said auditor, on the ground that said disallowance was a discrimination against money invested in national bank shares, prohibited by the act of Congress, and the complainant alleges that said issue, so determined and adjudged was between the same parties, involved the same subject-matter and legislation and the judgment given therein remains wholly unreversed and is still in full force and operation."

To the bill containing these averments the defendant demurred (Record p. 256) on, among other grounds, the one, "that the facts stated and the allegations contained in the petition (bill) of complaint aforesaid, did not constitute a cause of action herein."

This demurrer was overruled. The following is a copy of the judgment: (Record p. 256.)

"The parties appearing by counsel, this cause came on for hearing and by consent of the parties the judgment or order *pro confesso* heretofore entered in said case, is hereby vacated and the respondent has leave to demur to said complaint; and thereupon came the respondent and demurred to the bill of complaint; and the cause came on for hearing upon said demurrer and was argued by counsel; on consideration whereof it was ordered, adjudged and decreed that said demurrer be and the same is, hereby overruled, and the defendant electing to stand by his demurrer, the court upon further hearing find the allegations of the complainant's bill to be true, and that the tax therein sought to be enjoined was illegally assessed and entered upon the

treasurer's duplicate for collection. It is therefore ordered, adjudged and decreed that the defendant and his successors in office be and they are hereby perpetually enjoined from collecting or in any way or manner attempting to collect the said illegal tax set out and particularly described in said bill of complaint."

## I.

### Argument upon the Legal Question Arising upon the Effect of the Former Adjudications.

In the law relating to *res adjudicata*, two things are thoroughly settled:

First, a judgment rendered by a court of competent jurisdiction on the merits is a bar to any future suit between the same parties or their privies upon the same cause of action, so long as it remains unmodified.

Secondly, a right, question or fact, which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a court of competent jurisdiction, cannot be again drawn in question in any future action between the same parties or their privies, whether the cause of action in the two suits be identical or not.

2 Black on Judgments, sec. 504.

*Hixson vs. Ogg*, 53 O. S. 361.

*New Orleans* vs. *Citizens Bank*, 167 U. S. 371.

*The Southern Pacific R. R. Co* vs. *The United States*, 168 U. S. 1.

And it matters not in the least whether the question was correctly decided or not, whether the law applicable to the case was correctly determined, nor whether the question decided was one of law or fact, "whatever the question involved—whether the interpretation of a private contract, the legality of an individual act, or the validity of a legislative enactment, the rule of finality is the same. The controversy has been adjudged, and once finally passed upon is never to be renewed."

Cooley Const. Lim. 47.

*Hollister* vs. *Abbott*, 11 Foster 448

*Wells* on *Res Adjudicata*, p. 5.

*Yates, Exrs.* vs. *Hunter*, 3 Strob. Eq. 139.

*Balcum* vs. *Satcher*, 51 Ala. 82

*Bogarder* vs. *Clark*, 4 Paige 623

"This principle pervades not only our own, but all other systems of jurisprudence, and has become a rule of universal law founded on the soundest policy."

3 Bouvier Institutes, 3115.

It had its origin in the civil law, the rule being:

*Exceptionem rei judicate obstare quotics eadem quaestio inter easdem personas revocatur."*

Pothier, ad D. 44 l. l. pr.
Phillimore Rom. L. 47, 53, et seq.
Brooms Legal Maxims, 328,
or, as stated by Vinnius,

"*Hae autem exceptio (rei judicatae) non aliter genti obstat quam si eadem quoestio inter eadem personas revocatur; itaque ita demum nocet si omnia sint eadem, idem corpus, eadem quantitas, idem jus, eadem causa petendi, eademque conditio personarum.*"

*Vinnius, lib* 4, *tit,* 13, *s.* 5.

*Res judicata pro veritate accipitur.*

"An issue properly determined is a bar, not only as to any dispute as to the facts, but also to any further consideration of the law bearing on the case."

21 Am. & Eng. Ency. of Law, 129.

*Imrie* vs. *Castrique,* 8 C. B. N. S., 405; 98 E. C. L. 403. *Southern Etc. Co.* vs. *Henlein,* 56 Ala. 368.

The rule obtains as well in an action by the government as in an action between individuals. *United States* vs. *Parker,* 120 U. S. 89.

The principle applies as well to a judgment declaring the sufficiency of certain facts to constitute a cause of action, where the court has jurisdiction to pronounce upon their sufficiency, as to a judgment upon any other question. A judgment in an action of law, or the decree in a suit in chancery, upon overruling a demurrer to the petition or bill, the ground of the demurrer being that the facts stated are insufficient to constitute a cause of action, or to entitle the party to the relief sought, is conclusive between the parties, of the sufficiency of such facts to entitle the plaintiff to judgment in any future action where their sufficiency is drawn in question. To deny the application of the principle of the thing adjudged to a question of the sufficiency of pleadings to warrant a judgment on the facts stated, is to destroy the principle itself, or engraft an exception upon a principle of universal application. Whatever the fact, or question, and however it arises, when once adjudicated, an estoppel by record at once obtains depriving a party or privy from drawing the same fact or question into further ligitation.

As said in *New Orleans* vs. *Citizens Bank,* 167 U. S. 399, "the very essence of judicial power is that when a matter is once ascertained and determined, it is forever concluded when it arises again under the same circumstances and conditions between the parties, or their privies."

It can make no possible difference what the matter is, or whether the question arises on demurrer, or issue joined upon the facts alleged.

The Whitbeck case most explicitly decided that the owner of bank shares had the right to deduct his legal *bona fide* debts from the value of his shares. The right to the deduction was one of the two principal questions certified for the decision of this court, and it was definitely answered, and a denial of the deduction was held to be a discrimination forbidden by the Act of Congress.

The fact in issue was **did the right given by the state statute to the owner of moneyed capital invested in credits to deduct his legal bona fide debts therefrom in ascertaining their value for taxation—a right denied to the shareholder as respected his shares—**

**violate the restriction of the Act of Congress which permitted taxation of national bank shares only by compliance with the requirement that the taxation should be at no greater rate or valuation than that assessed upon other moneyed capital in the hands of individual citizens of the state?** This was the matter upon which the plaintiff proceeded by its action, and which the defendant controverted by his answer, thereby making it the direct point or question in issue. The fact was found as averred and went into judgment. Moreover, the special master, to whom the question of the right of the shareholders to the deduction claimed was referred, reported that he found that all the shareholders but two "*were entitled* to the *deduction as charged in the bill*;" and on this report and the testimony and exhibits adduced, the court found *all the allegations* of the bill *to be true*, and followed this finding by a judgment perpetually enjoining the collection of the tax on the amount of the deduction so claimed. The ground, therefore, on which the recovery proceeded, stated in other words, was, that the statute of Ohio in permitting the deduction of *bona fide* indebtedness from credits, which in terms included all legal claims and demands, denied to the shareholder as respected moneyed capital invested in his shares, created a discrimination prohibited by the Act of Congress. This was the actual and necessary result of the finding and the decree. The judgment pronounced could not have been given without deciding the question, and hence, the judgment is to be considered as having settled that question for the parties thereto, in all future actions involving the same question. *Picket Company* vs. *Van Sickles*, 5 Wall. 592.

Having "identity of the thing demanded, identity of question and identity of the parties and their qualities, the legal presumption is established in favor of the thing adjudged," *Slocomb* vs. *Lirardi*, 21 La. Ann., 356.

The rule applies as well to decrees in chancery as to judgments at law. *Hopkins* vs. *Lee*, 6 Wheat. 113.

The finding by the court has the same effect as would have attached to a special verdict, finding all the allegations of the bill to be true, which assuredly would be the equivalent of finding all the issues with the complainant. And where all the issues are found with the plaintiff, or all the allegations contained in his bill of complaint are found to be true, which is the same thing, followed by a decree giving effect to the facts so found, the pleadings with the findings and judgment are alone to be looked to for the effect of the judgment.

It is the matter alleged by the party upon which the recovery proceeds which creates the estoppel.

*Outram* vs. *Moorewood*, 3 East. 346. *Cromwell* vs. *County of Sac*, 94 U. S., 353.

What the matter is and the finding upon it, and the judgment given, can only be determined by reference to the record of the court in which the proceedings were had.

"The record furnishes the only proper proof of the judgment."

*Packet Co.* vs. *Sickles*, 5 Wall. 580. *Wood* vs. *Jackson*, 8 Wend. 36. *Lawrence* vs. *Hunt*, 10 Wend. 85 *Porter* vs. *Wagner*, 36 O. S. 471.

No court has asserted with more distinctness than has this court, the effect of a former judgment or decree on future litigation by which

it is sought to reopen and renew the discussion of questions already in judgment. Nor has any court declared any rule more directly applicable to a case of the character of the present one than is found in *New Orleans* vs. *The Citizens Bank*, 167 U. S. 371, more particularly referred to hereafter.

In *Jeter* vs. *Hewitt*, 22 How. 364, Mr. Justice Campbell, speaking for the court as to the authority of *res adjudicata* under the civil code of Louisiana, said, what may be said under any system of procedure, "under the system of that state the maintenance of public order, the repose of society and the quiet of families, require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth. So deeply is the principle implanted in our jurisprudence that commentators upon it, have said, the *res judicata* renders white that which is black, and straight that which is crooked. *Facit ex curvo rectum, ex albo nigrum.* No other evidence can afford strength to the presumption of the truth it creates, and no argument can detract from its legal efficacy."

In *Aurora City* vs. *West*, 7 Wall., 82, the court, after noting the fact that courts in stating the rule, do not always employ the same language, say:

"The better opinion is that the estoppel where the judgment was rendered upon its merits, whether on demurrer, agreed statement, or verdict, extends *to every material allegation, or statement*, which having been made on one side and denied on the other, was at issue in the cause and was determined in the course of the proceedings."

And at another place in the same opinion the court say:

"Where every objection urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit and might have been presented at that trial, the matter must be considered as having passed *in rem judicatam*, and the former judgment in such case is conclusive between the parties."

In *Southern Pacific Railroad* vs. *United States*, 168 U. S. 1, the rule is stated in the following incisive language:

"A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact, once so determined, must as between the same parties or their privies be taken as conclusively established so long as the judgment in the first suit remains unmodified."

Following this clear and distinct announcement of the rule, in *Mitchell* vs. *National Bank of Chicago*, 180 U. S., 471, it was unanimously held that, "whatever may be the nature of the question presented for judicial determination, whether depending on federal, general or local law, if it be expressed by the issues made, its determination by a court having jurisdiction of the parties and of the subject matter, binds the parties and their privies so long as the judgment remains unmodified or unreversed."

In *Bryar* vs. *Campbell*, 177 U. S. 649, the court in speaking of a judgment in a state court, say:

"The judgment of the state court was *res adjudicata* of *all the issues* between the parties."

In *Sheets* vs. *Sheldon*, 7 Wall. 416, it was held the plea of *res adjudicata*, applies to every objection charged in the second suit when the objection was open to the party within the legitimate scope of the pleadings in a former one and might have been presented in it."

In *Railroad* vs. *Railroad*, 20 Wall. 137, it was held: "Where in a judicial proceeding the matter passed upon is the right under the language of a certain contract to take receipts on a railroad, the judgment concludes the question of the meaning of the contract on a suit for subsequent tolls received under the same contract."

In *Bank* vs. *Beverly*, 1 How. 134, it was held that a judgment giving construction to a will was beyond any future controversy between the parties involving such construction. The court say:

"Whatever our opinion may now be as to the facts adjudicated in the former case, the judicial power is incompetent to revise the evidence on which the decree was rendered on any ground now set up in the answer of the defendants or apparent on the present record, and they must be taken to be beyond all controversy in this or any future case between the parties."

The grounds set up in the answer in that case were as in this, those involved in the former adjudication.

If the construction of a contract or a will, is binding upon the parties in a future litigation, what doubt can there be that the construction of a statute is also binding upon parties in subsequent litigation over the same question.

In *New Orleans* vs. *Citizens Saving Bank, supra*, the question involved related to a tax, and it was there distinctly held that where the right or question upon which the exemption from taxation was claimed had been in a former suit judicially determined upon identically the same facts and circumstances as those presented in the second suit, the former judgment was *res adjudicata* and conclusive upon the parties and estopped the attempted enforcement of such taxes. In the course of an exhaustive opinion on the subject the court say:

"No principle of law is more inflexible than that which fixes the absoluteness of such a judgment upon the parties and their privies. Whether the reasons upon which it was based were sound or not, and even if no reasons at all were given, the judgment imports absolute verity, and the parties are forever estopped from disputing its correctness."

It was further said:

"Matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objection though the judgment may have been erroneous and liable and certain of reversal in a higher court;" and tnat "the estoppel extends to *every material allegation*, or statement, which having been made on one side and denied on the other, was at issue in the case and was determined therein."

The court adds:

"It follows then that the mere fact that the demand in this case is for a tax for one year and the demand in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged if in the prior cases the question of exemption was necessarily

presented and determined upon identically the same facts upon which the right of exemption is now claimed."

This statement entirely covers the present case.

Applying the principle thus so firmly settled to the question involved in the present controversy, we at once reach a decisive result.

By the record in the first, or Whitbeck case, the judgment was given upon the issues made by the bill and answer and the master's report, the court finding all the allegations of the bill to be true. The master's report also found the right to the deduction. In the second, or Kimberley case, the judgment was given upon like issues by bill and answer with a specific finding that the shareholders were entitled to the deductions claimed; and in the third, or Shields case, the only question being the right to the deduction, final judgment was given on overruling the demurrer to the bill, the treasurer electing to stand by his demurrer.

Opposing counsel advise us that in their brief they shall put their denial of the estoppel, which we claim arises from these judgments, on two grounds; first, that the decision of this court in the Whitbeck case, being upon a false assumption of the law, cannot remain *res adjudicata* in future cases involving taxes. Secondly, that the principle of *res adjudicata* cannot apply, for while the case is between the same parties, it does not involve the same subject matter. Neither of these positions has the slightest foundation to rest upon.

It is a fundamental maxim of the law that a man shall not be twice vexed for one and the same cause. *Nemo debet bis vexari pro una et eadem causa. Interest republicae ut sit finis litium.*

Broom, in speaking of this general maxim, says:

"It has, as may readily be supposed, a wide application; it in fact embraces the whole doctrine of estoppel which is obviously founded in common sense and sound policy, since, if facts once solemnly affirmed to be true were to be again denied, whenever the affirmant saw his opportunity, there would never be an end to litigation and confusion," Brooms Legal Maxims 343.

The principle *transit in rem judicatam* proceeds on the incontestable assumption that the judgment speaks the truth as respects the right, question or fact involved in the issue determined.

As said by Peckham J., in *Sheldon* vs. *Edwards*, 35 N. Y. 289.

"Of what benefit to either party to try an issue if the finding is of no consequence and if the judgment thereon have no effect. The law presumes it was properly tried, that all the facts bearing upon the issue were fully and thoroughly presented."

Whether the question was well or ill decided is wholly irrelevant.

Whether the former case was decided upon a false or correct assumption of law does not in the least affect the verity of the thing adjudged, or the operation and effect of the judgment so long as it remains unmodified. It conclusively speaks the truth upon every issue covered by the finding. *Interest republicae, res judicatas non rescindi.*

"Matters once determined in a court of competent jurisdiction may never again be called into question by parties or privies against objection though the judgment may have been erroneous and liable to, and certain of, reversal in a higher court."

*New Orleans* vs. *Citizens Bank, supra.* Bigelow Estoppel 3d. ed. Outline p. p. lxi, 29, 57, 103.

The construction placed upon a contract, or will, or statute, is conclusively binding on the parties in all future litigation involving the construction of the same contract, will or statute.

*Bank* vs. *Beverly*, 1 How. *supra*. *Railroad* vs. *Railroad*, 20 Wall. *supra*.

This doctrine is universally recognized in all tribunals where the common law prevails.

II.

The second of the above propositions of our adversaries is equally ill founded. The subject matter of the two suits is precisely the same. The claims of the two cases, the former and the present one, are, in the strictest sense identical. The statutes upon whose effect and operation the claim arises are literally the same in the two cases. The right to a deduction of the legal *bona fide* debts from the assessed value of national bank shares, was the question involved in the former adjudication and wholly depended on the construction of the statutes. It is identically the same question that is involved in the present controversy arising under the same legislation without change of a line or word. It is true that the tax sought to be enjoined is for a different year from that involved in the former suits, but the right thereto, and the right of the shareholder's exemption therefrom, depend upon the identical question that passed into the former judgment.

The only difference between the question here and the one decided in *New Orleans* vs. *Citizens Bank, supra*, is, in that case the right to the exemption arose out of a contract or obligation created by a state statute which a later statute sought to annul. Here the right to exemption arises out of the restriction of the Act of Congress with which the state legislation in providing for taxing the share capital at its full value, has been adjudged to be in conflict.

The remedy in each case being to restrain the operation of the state statute to the extent that it interferes with the rights of the bank so created.

Where a state statute is claimed to conflict with an Act of Congress the fact is ascertained by a comparison of the two statutes, and where it is asserted that state legislation on the subject of taxation results in its operation in taxing federal securities beyond, and in disregard of, the restrictions Congress has imposed as a condition upon which the securities may be taxed at all, the pleading by which the question is raised must necessarily set up by proper averments the state statute authorizing the tax with the claim of its infringement of the particular Act of Congress whose provisions are claimed to be violated, and when this is done and the court decide that such taxation is unauthorized, or is prohibited by the Act of Congress, and such decision is carried into the decree enjoining the enforcement of the state statute, as respects such securities, that decree forever binds the parties.

Where all the issues are found with the party, a judgment on the verdict, or special finding, becomes *res adjudicata* as to every one of such issues, no matter what their character may be.

*Bryar* vs. *Campbell*, 177 U. S. 649. *Glen* vs. *Summer*, 132 U. S. 152. *Sites* vs. *Haverstock*, 23 O. S. 626. *Life Insurance Co.* vs. *Sutphin*, 35 O. S. 360.

In *Flourney* vs. *Lastrapes*, 131 U. S. Appendix CLXL., the court held:

"A general verdict 'for the defendant' is equivalent to a special verdict on each and every one of the issues tried, and authorized any judgment that could be entered on such a finding."

In *Insurance Co.* vs. *Sutphin*, *supra*, the trial court found the issues, five in number, for the defendant, when only one should have been found in his favor. On error the judgment was opened and the finding on the four issues was vacated by the Supreme Court, for the reason if carried into judgment plaintiff would be estopped from thereafter asserting any right concluded thereby. When in the former cases the court found all the allegations of the bill to be true and carried such finding into the decree, the judgment became *res adjudicata* as to every material allegation of the bill. This proposition is so axiomatic that its statement seems an idle ceremony. Moreover, a judgment given on a master's report finding a particular fact or determining a particular question, as in the Whitbeck case, is conclusive of such fact or question in future controversies involving the same fact or question.

"The finding of a referee, like the verdict of a jury, constitutes an essential part of the record of the case. Such finding having gone into judgment is conclusive as to the facts found in all subsequent controversies between the parties.....Every defense requiring the negation of this fact is made and overturned by that adjudication."

Mr. Justice Field, in *Lumber Company* vs. *Buchtel*, 101 U. S. 653.

The question involved arising out of discriminatory legislation is not and cannot be affected by any outside conditions so long as the statutes remain the same. The former question decided was not what amount of debts or credits may exist, or may have existed, in any particular year, nor whether the owner of credits may have availed himself of the right to deduct his debts therefrom in order to fix their valuation for taxation; but the question was, has the state, in not providing for a like deduction of debts from the value of national bank shares, complied by its legislation, with the condition upon which Congress has authorized the taxation of moneyed capital so invested. It was held in the former cases that it had not, and consequently that the tax was void. The statute having the same operation from year to year it is difficult to see how conditions of debts or credits for particular years can affect its operation as respects its discriminatory character.

But if we look at the returns of moneyed capital for taxation made in Ohio during the last two decades reported yearly to the state auditor by the various county auditors of the state, and by the state auditor tabulated and bound in book form as required by the statute, we find that credits—declared to embrace all legal claims and demands—after deduction of all legal *bona fide* debts therefrom, more than double in amount all other moneyed investments in the state of every character, including money invested in bank shares. We need not, however, dis-

cuss the effect of this here, as it is not involved in the questions here made.

It having been held in 1887, 1888, 1889, and 1893, by the Circuit Court, that the state statute in its operation discriminated against national bank shares, the same result must obtain so long as the statute remains unchanged. So long as it does, it necessarily has the same operation between the parties. This proposition ought not to require discussion in view of its self-evident character.

But the result or judgment in *The Bank* vs. *Shields*, Treasurer, decided in 1893, and in the Kimberley case in 1889, utterly destroys the claim of our adversaries, if it otherwise has the least merit, that because the Whitbeck case was decided under an alleged misapprehension of the meaning of the Ohio statute that the judgment of the Circuit Court of Appeals was, therefore, wrong. No such claim affects these cases. In the Shields case the defendant elected to stand by his demurrer to the bill, which the court overruled, and in which case on further hearing the court found all the allegations of the bill to be true and gave judgment. Every material allegation of fact contained in the bill went into judgment—a judgment as effective in its efficacy and operation as if given on an express denial of all the averments of the bill.

The right to the deduction was the only question in the case. It was the very substance of the issue. It arose upon identically the same legislation as does the present suit, and, as said in *New Orleans* vs. *Citizens Bank*, 167 U S. 391:

"In the pleadings there was nothing which justified the decree, or *to which it was responsive*, except the exemption of the bank."

And as there further said, "it was based on the identical claim of exemption now asserted by the bank in order to defeat the taxes now in question."

If the bill had been dismissed on the merits what doubt would exist that the bank would be estopped from renewing the discussion of the questions therein at issue?

That a judgment following the overruling of a demurrer is as conclusive as if given upon an issue joined upon all the facts is well settled law.

In *Bissel* vs. *Spring Valley Township*, 124 U. S. p. 232, this court speaking to the point by Mr. Justice Field, said:

"The law on this subject is well stated in Gould's Treatise on Pleadings, a work of recognized merit in this country, as follows: 'A judgment rendered upon a demurrer is equally conclusive (by way of estoppel) of the facts confessed by the demurrer as a verdict finding the same facts would have been. Since they are established as well in the former case as in the latter by way of record. And facts thus established can never afterwards be contested between the same parties or those in privity with them.'"

To the same effect is *Clearwater* vs. *Meridith*, 1 Wall. 26. *Goodrich*. vs. *The City*, 5 Wall. 566. *Gould* vs. *R. R. Co.*, 91 U. S. 526.

Therefore, whatever view is taken of the decree in the Whitbeck case, there cannot be the slightest doubt of the correctness of the decision of the Circuit Court of Appeals as to the effect of the decree in the Shields case. To hold otherwise is to overturn a uniform line of deci-

sions by which it is held that where parties have had their day in court, the question involved in the issue and carried into judgment must as respects parties or privies, be regarded as conclusively settled for all time.

The former judgment has been held a bar by the judgment in the Shields case.

Besides the general question of the effect of the former adjudication pleaded, it is distinctly found in the Shields case, and the finding was carried into the decree, that the Whitbeck case adjudicated the question of the right of the shareholders of the bank to the exemption claimed. We direct particular attention to the following averment in the Shields case, Record p. 250:

"The complainant further avers hereto, to-wit.: At a date prior to the April term of this court in the year 1887, the complainant brought suit against Horatio N. Whitbeck, as Treasurer of Cuyahoga County, who then held such office, to enjoin the collection of the excessive taxation of shares of said complainant, growing out of the refusal of the taxing officers of said county to allow the deduction of *bona fide* debts of stockholders from the assessed value of said shares, said Whitbeck then representing the same interest, sustaining the same relation and charged with the same duties to the public as the present defendant; and in said suit this complainant alleged by its bill the refusal by the then auditor of said county, to allow a deduction of *bona fide* debts of the shareholders from the value of shares of stock of said complainant owned in large part by the same stockholders as those above named, and in which action said treasurer of said county, admitting said refusal to allow said reduction so joined issue as to present the question of the right of said owners of said shares, to said deduction, in view of the laws of Ohio, the said laws being the same as the present laws of the state and those under which the taxing officers of said county acted in 1892 and 1893, in making assessments and refusing deductions to be made of *bona fide* debts of stockholders from the valuation of said shares; and the complainant says upon the issue so joined, the said court at its April term, A. D. 1887, held and determined the said shareholders were by law entitled to said deduction of *bona fide* debts from the value of their said shares, to an equal amount fixed for taxation; and in said action the court gave judgment perpetually enjoining said treasurer from collecting or attempting to collect any tax or assessment on the valuation of said shares to an amount equal to said debts from which said deduction was sought to be made and disallowed by said auditor, *on the ground that said disallowance was a discrimination against money invested in national bank shares, prohibited by the Act of Congress;* and the complainant alleges that said issue so determined and adjudged, was between the same parties, involved the same subject matter and legislation and the judgment given therein remains wholly unreversed and is still in full force and operation."

This averment was found to be true—every allegation of the complainant's bill was found to be true.

We, have, therefore, in addition to the usual effect given to the former adjudication of the same question a finding declaring that the former adjudication involved the same question carried into the later judg-

ment—a judgment finding the question to have been concluded by a former judgment.

From this it indubitably follows that the decree of 1893 was a conclusive adjudication of the right of the complainant to the relief here sought. The court could not have given the judgment in the Shields case—it was an impossibility—without finding that the section of the Ohio statutes defining credits by limiting them to what one owns less his *bona fide* debts, created a discrimination prohibited by the Act of Congress under which the right to tax national bank shares was created. The question was involved and necessarily decided. It "was a fact requisite to be proved and established in order to obtain the judgment; hence the question of right determined has passed in *rem judicatam.*"

*Blair* vs. *Bartlett*, 75 N. Y., 150.

*Grant* vs. *Ramsey*, 7 O. S., 157.

It was the matter upon which we proceeded by our action and which the treasurer controverted by his demurrer. *Taylor* vs. *Dustin*, 42 N. H., 495.

Of the fact that the statute defining credits, section 2730, is the same now as when the former decree was given, the court will take judicial notice.

*Hanley* vs. *Donoghue*, 116 U. S. 1.

*Gormley* vs. *Bunyan*, 138 U. S. 623.

The same is the fact as to section 5219 of the Revised Statutes of the United States defining the restrictions under which national bank shares may be taxed by or under state authority. There has been no change in that section and the master expressly finds to be true the averment contained in both bills, that:

"In said year, 1897, a large amount of moneyed capital in the hands of individual citizens of the state invested in promissory notes and other obligations and credits, was by section 2730 of the Revised Statutes of Ohio authorized to be exempted from taxation through the deductions therefrom of legal *bona fide* debts." (Record 51.)

Having the same legislation now as when the former decree was rendered defining the exemptions from taxation, and their extent, placed on moneyed capital in the hands of individual citizens of the state; having the same averments in the two bills; and having a decree adjudging those exemptions to be such as to create a discrimination against capital invested in national bank shares, and the declared consequences resulting from such discrimination, to be "that the owners of such shares are entitled to have a deduction of their indebtedness made from their assessed value as in the case of other moenyed capital," any process of reasoning that works out the conclusion that we are not now entitled to the same judgment we formerly received, we respectfully submit, must necessarily be fallacious.

Without prolonging a discussion already too protracted, we respectfully submit that the former adjudications relied on in support of the judgment of the Circuit Court of Appeals under review are decisive of the correctness of that judgment.

Respectfully submitted,

W. W. BOYNTON,
Solicitor for Appellee.

No. 227.

Add'l. Brf. of Boynton for Appellee.

Filed Mar. 15, 1902.

No. 227.

# Supreme Court of the United States.

MARCELLUS A. LANDER, TREASURER,
vs.
MERCANTILE NATIONAL BANK.

## *ADDITIONAL BRIEF OF APPELLEE.*

IN RESPONSE TO BRIEF OF APPELLANT.

### I.

The brief of the appellant having reached us since the printing of our original brief, we beg the court's leave to direct attention to much of its contents which we regard as matter wholly irrelevent to the questions to be decided.

The first twenty-five pages of appellant's brief are devoted to an endeavor to establish two facts; first, that in Ohio legal *bona fide* debts cannot be taken from the value of national bank shares; and second, that inasmuch as the Supreme Court of Ohio has held that such deduction could not be had, that decision will be followed by this court, whether right or wrong. The first of these two propositions is not involved in the case, as in the Circuit Court of Appeals that question was by us distinctly waived, the appellee deeming the former judgments pleaded to be fully adequate for the protection of its stockholders as to the deductions claimed.

The second of the above propositions, that this court is bound by the state adjudications, is not supported by a single authority, and is directly in conflict with a long line of decisions of this court. The question is not whether the laws of Ohio authorize the deduction of debts from the value of bank shares. It is very clear that they do not. The question is; because of the fact that they do not, is the Act of Congress permitting their taxation under the restriction as to rate and valuation to that of other moneyed capital in the hands of individual citizens of the state, violated by the provision of the Ohio statute permitting *bona fide* debts to be deducted from all legal claims and demands under the denomination of credits, such deduction being denied to national bank shares. This is a purely federal question and the decision of it by a state court does not fall within the rule adopted in this court, of following the decision of the Supreme Court of the state on the construction of state statutes. The bare statement of the question at once shows that it belongs to the class where the federal courts are the final arbiters, and where they dispose of the question without regard to the state holding.

## II.

The next question discussed by learned counsel in their brief (commencing on page 26) is as there stated, *an examination of the findings of fact as bearing upon the question of discrimination against bank shares.* Ten pages are devoted to a discussion of the rules for the valuation of bank shares. In view of the fact that we made but two questions for the decision of the Circuit Court of Appeals, the only ones they adverted to in their opinion;—the one relating to the jurisdiction of the State Board of Equalization for incorporated banks to take the action had upon the 4th day of December, resulting in increasing the valuations fixed by the county auditor on the shares of appellee's stock, in the sum of $123,000 without notice to the bank; the other relating wholly to the effect of the former adjudications determining the right to reduce the valuation of the shares by taking *bona fide* indebtedness therefrom; we are at a loss to see the relevancy to either of these questions of any action taken by the assessing officers relating to the mode of estimating the valuation of the bank shares.

If the board at its final meeting was without jurisdiction of the parties as held by the Supreme Court of Ohio, its action was void. And to determine that question, the mode of the valuation of property for taxation by the assessing officers, is wholly irrelevant.

## III.

The third point made in appellant's brief (commencing on page 37), relates to the failure to give the officers of the bank or its stockholders notice of the meeting of the State Board of Equalization of December 4th, at which action was to be taken on the county auditor's valuation. We desire at the outset to correct a palpable error that opposing counsel have fallen into. They open the discussion of the third point by saying.

> "If the complainant bank had not the right to have its shareholders' debts deduced from the value of their bank shares before returning the same for taxation, but the auditor of Cuyahoga County had so permitted them to be **deducted** when the state board of equalization for banks added to the bank's returns a part of the debts so illegally deducted and did not give actual notice to the bank, it fully complied with the law."

There is an assumption here wholly at variance with the truth. The County Auditor had not made and did not make any deduction of debts in fixing the valuation of the shares. The valuation was made by him without regard to debts. Moreover, as opposing counsel must know, but seemingly have overlooked, the county auditor did not allow any deductions for the year 1897. This is our complaint for which we are seeking relief, so that the statement above referred to, that the state Board of Equalization in increasing the County Auditors' valuation only restored a part of the deduction wrongfully made, is wholly gra-

tuitous without a semblance of support from actual facts. The contention that the statutory notice to the bank and its stockholders, that the board would meet on the third Tuesday of June to hear complaints and to equalize the value of the shares, bound the bank to find out when the board would re-assemble from their *sine die* adjournment, is indeed novel. Its absurdity is so gross as to permit of no discussion. Among the vast number of cases cited to the proposition of opposing counsel that the statutory notice fixing the time and place of the meeting of the board, namely, at the State Auditor's office on the third Tuesday of June is sufficient notice of the action taken or to be taken on December 4th, not even one can be found that gives the slightest support to the proposition. In every one of the cases cited, and especially in those from Ohio, the action was taken on the day appointed by the statute, or on some day certain to which an adjournment was definitely made. An argument to show that such authorities do not apply to a meeting not on the day apopinted by the statute held at the mere call of a member of the board and on a day of which no notice whatever was given to the parties interested in the action to be taken, would be an idle ceremony. The fact should not be overlooked, nor its force undervalued that this December meeting when the usurped action was taken, was more than a month after the law required the duplicate to be in the treasurer's hands containing the list of the taxes to be collected. The contention that the bank was not damaged by want of notice because the bank shares were not assessed at more that the constitution and laws of Ohio require, we have heretofore shown to be wholly untenable. The Master's finding shows that in the taxing district where the bank is located all moneyed capital is taxed at sixty per cent. of its actual value and the necessary rate fixed to secure the money needed to meet the public requirements. And no injustice is done in taking sixty dollars as the actual value of one hundred dollars, because to raise the amount required the rate is correspondingly increased. At sixty per cent. valuation the rate in Cuyahoga county is three cents on the dollar. If the valuation was taken at one hundred dollars the rate to raise the same amount of money would be but one cent and eight mills. Where taxes are illegally levied the Revised Statutes of Ohio, section 5848, authorize an action to enjoin collection. And it has been repeatedly held that the federal courts would enforce this provision.

*Cummings* vs. *National Bank* 101 U. S. 157.

*Grether* vs. *Wright*, 23 C. C. App. 498.

In *Champaign County* vs. *Smith*, 7 O. S. 42 the court held the statute requiring notice to be mandatory and that the action of the auditor without notice was void, because of the want of jurisdiction of the party affected thereby. The same contention of the appellant was overruled in the thirteen cases brought in the state courts of Cuyahoga County to enjoin the action of this very board at its December 4th meeting, and the tax on the addition was perpetually enjoined.

Opposing counsel admit that "if the issues of law and fact in the Whitbeck case were the same as in the case at bar, then the matter adjudicated in the Whitbeck case is *res adjudicata* as to the case at bar," (brief p. 50). But they draw a distinction between the two cases from the circumstance that the tax sought to be enjoined was levied

in a different year and they cite Iowa and Kentucky cases to support the case made. This point was distinctly settled by this court in *New Orleans* vs. *Citizens Bank*, 167 U. S. 371, and adversely to the claim now made. They further contend that the cases are different because in the pleading of the Whitbeck case it was said that the laws of Ohio authorized and permitted the owner of credits to deduct therefrom all debts owing by him and required him to list for taxation only in excess of his credits over his indebtedness. The bill in the Whitbeck case set out the Ohio Statute and referred to the Act of Congress to which the state statute was claimed to be in conflict, and such conflict was found and adjudged. On reference, the master found that by reason of the legislation bearing on the subject the owners of shares were entitled to the deductions as claimed in the bill. The court on final hearing found the entire issue with the bank. The bill in the present case sets out the same statute and makes the claim of discrimination and the further claim that the question is concluded by the former adjudication. But the statute of Ohio, section 2730, does allow the deduction of all legal *bona fide* debts from credits. This is its language, but it provides that in determining what are legal *bona fide* debts, obligations to mutual insurance companies, unpaid subscriptions to capital stock of any joint stock company and subscriptions to religious, scientific, literary or charitable purposes shall not be considered legal *bona fide* debts. The effect of the exclusion is to declare that these charitable obligations are not *bona fide* debts within the intendment of the statute. The court found both in the Whitbeck case and in the Shields case, that allowing debts to be taken from credits for the purpose of determining their value for taxation, a right denied to national bank shares, violated the restriction of the act of Congress. But counsel make a very curt disposition of the decree and judgment in the Shields case. They say in effect (brief p. 63) that if the decree in the Whitbeck case was founded on a misconception of the Ohio statutes, the decree in the Shields case cannot avail, as the decision in the Whitbeck case was the basis of that decree. We have shown in our original brief that if this contention were true, the conclusion is entirely ill founded. It matters not in the least what view the court took of the law, the final judgment concludes the question decided in every future litigation between the parties involving the same question. It may be true that the Circuit Court in giving judgment in the Shields case was of the opinion—not a violent one—that the Whitbeck case was an authority for its judgment. Whether such was its opinion is matter wholly irrelevant to the effect of the judgment. But there is one feature of the Shields case that counsel overlook, although brought pointedly to their attention by the record and by the opinion of the Circuit Court of Appeals, and that is, that the judgment in the Shields case ascertained and included the fact that by the Whitbeck decree the right to deduct debts from the value of bank shares was put directly in issue and was as conclusively determined.

We shall only allude to one other statement of counsel. They say (brief p. 56) that they wish to call the attention of the court to what the Supreme Court of Ohio say about the plea of *res adjudicata*. They then quote from the opinion in the Chapman case the following language:

"But it is said by counsel for the bank that the question is *res adjudicata,* and has been determined and settled by the Supreme Court of the United States in *Whitbeck* vs. *Mercantile National Bank,* 127 U. S. 193."

The court then comment on the decision. The least attention to the questions involved in that case will show that the court misused the term *res adjudicata.* The term *stare decisis,* would have been more appropriate, as in that case not even the slightest claim was made that the question had been formerly settled between the parties to that case. What the court obviously meant was that counsel claimed that the Whitbeck decision was conclusive, as a binding authority, of the issues in the Chapman case.

Finally, our adversaries fall into the error pointed out in our main brief regarding what this court said in the opinion in the Whitbeck case, and its affirmance of the judgment of the Circuit Court as the matter that creates the estoppel. The estoppel as we have shown is ascertained and wholly so, by an examination of the pleadings in the former cases and the judgments or decrees entered thereon in the Circuit Court.

Respectfully submitted

W. W. BOYNTON.

No. 227.
Reply Brf. of Boynton for Appellee.

# Supreme Court of the United States.

No. 227.
Filed April 16, 1902.

MARCELLUS A. LANDER, AS TREASURER OF CUYAHOGA COUNTY, OHIO, APPELLANT,

vs.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, APPELLEE.

---

REPLY TO SUPPLEMENTAL BRIEF OF APPELLANT.

---

Counsel for appellant, not taking issue with the matter contained in our additional brief by which we pointed out the utter irrelevancy to the question involved of most of the discussion in their original brief, now by a supplemental brief seek to escape the result following from the want of jurisdiction of the State Board of Equalization for banks to make the increase of valuation complained of, by the contention that a court of equity has no jurisdiction to grant relief from the board's illegal action although such jurisdiction is expressly conferred by statute; their contention being that section 167 of the Ohio Statute provides a plain, adequate and complete remedy at law. The argument used in support of this claim is the same even in its phraseology that was used in the case of *Black et al., Trustee*, vs. *Haggerty*, 60 O. S. 551, where the claimed effect of section 167 was repudiated by the Supreme Court of Ohio. By this section the state auditor is authorized to "remit such *taxes* and *penalties* thereon as he ascertains to have been illegally assessed, and such *penalties* as have accrued or may accrue in consequence of the negligence or error of any officer required to do any duty relating to the assessment of property for taxation or to the levy or collection of taxes; and he may from time to time correct any error in any assessment of property for taxation or in the duplicate of taxes in any county." By this section the power of the state auditor over the subject is limited to the remission of taxes and penalties *illegally assessed* and to such *penalties*, not taxes, "as have accrued or may accrue in consequence of the negligence or error of any officer." There is not the slightest power or authority given to the state auditor to increase or diminish a valuation fixed by a Board of Equalization. Opposing counsel seem to have read this section of the Ohio Statute to

little effect if they deduce from it the power of the state auditor and his associates to remit "taxes," "in *any* amount that have accrued or may accrue in consequence of the error of any officer required to do any duty relating to the assessment of property for taxation" as stated (page 4) in their brief. Its language imports no such power. He may remit taxes *and* penalties for illegality. He may remit penalties *for negligence* or error of some officer not amounting to illegality. Power to make remission for such error is expressly confined to "penalties" and in no case reaches taxes which are merely erroneously assessed. In our case no penalties existed. By the proviso to the section, the auditor is authorized to remit in any one case an amount not exceeding one hundred dollars. Suppose the State Board of Equalization for banks had increased the valuation of the shares of some bank an even hundred dollars, is the state auditor empowered by this section to set aside such increase and annul the action of himself and two others constituting the Board of Equalization? He has the same power in all cases of alleged illegality where the sum does not exceed one hundred dollars, as he, the governor and attorney general, have in cases involving more than that amount. It requires but little reflection to show that this section confers no such power. The power of the Board of Equalization under section 2809 is to hear complaints and equalize values. Section 167 gives no power to hear complaints and review the action of the board, or to determine that the equalization was erroneous. Moreover, section 2808 provides for notice to the bank of the hearing by appointing the day therefor, in order that it may aid the process of equalization. Section 167 provides for no notice to any one of the action therein provided for. The power of the two tribunals derived from these two sections is essentially different. We are not without authority on the point.

In *Black* vs. *Haggerty*, 60 O. S. 551 it was held "that the power conferred by section 167 of the Ohio Statutes to remit taxes does not authorize the state auditor and his associates to reduce valuation made by a local board of equalization;" hence it is certainly true that the state auditor, governor and attorney general, in the exercise of the power conferred by section 167, cannot reverse and annul their action as a board of equalization for banks under sections 2808 and 2809. If they cannot reduce a valuation of a local board, *a fortiori*, can they not reduce a valuation of the state board of equalization for banks. Their power under sec. 167 is the same that it would be if other individuals composed the state board of equalization. If the contention of opposite counsel were true, no case could be prosecuted in the state of Ohio in its state courts to enjoin the collection of taxes illegally assessed, although expressly authorized by section 5848 of the Ohio statute. That section provides.

"Courts of common pleas and superior courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either, and all actions to recover back such taxes or assessments as have been collected without regard to the amount thereof."

Section 5850 also provides:

"Actions to enjoin the collection of taxes and asessments must be brought against the officer whose duty it is to collect the same; actions to recover back taxes and assessments must be brought against the

officer who made the collection, or if he is dead, against his personal representative."

The construction of sec. 167, contended for by our adversary, would repeal and render these sections inoperative, although enacted long after section 167 was placed in the statute. If a shareholder in a bank would be required to invoke the power of the auditor and his associates under section 167 of the statutes in order to get rid of an illegal valuation of his property, every other taxpayer in the state would be required to resort to the same tribunal for like relief. Moreover, such a construction would demonstrate that every action brought to restrain the collection of taxes illegally assessed in Ohio for the last forty years had been illegally brought. The whole object of section 167 was to authorize the remission of taxes and penalties illegally assessed. It does not authorize the review of values fixed by the board of equalization. This was so stated in *Black* vs. *Haggerty*, supra, p. 559:

"While the auditor of state is vested with authority under section 167 to remit taxes and penalties illegally assessed, he is without authority to overrule the judgment of the local board in a case in which it might legally act."

But if the preposterous proposition were conceded, that section 167 authorizes a review of the action of the state board of equalization for banks, it would not defeat the jurisdiction of the courts conferred by section 5848 above recited. In *Haggerty* vs. *Huddleston*, 60 O. S. 149, the head note is as follows:

"The record of a board of equalization is not conclusive, but is only *prima facie* evidence in an action by a taxpayer under section 5848, Revised Statutes, challenging the legality of a tax or assessment."

In the opinion (page 165) the court say:

"All taxes and assessments in this state are levied and assessed by officers and boards subject to the test of legality by the courts, and when illegal they will be enjoined.....The right of the citizen to test the legality of a tax or assessment under section 5848 cannot be taken away by any record that can be made by a taxing office or board. The right is given to all to have final test as to the legality, in the courts, no matter what record may have been made by the taxing officers and boards.....The proceedings and record of the county auditor under sections 2781 and 2782 stand upon the same footing, and neither is conclusive when challenged in a proceeding under section 5848."

This case announces no new doctrine. The law has been as thus expressed for a half a century.

That federal courts will exercise the power and jurisdiction conferred by section 5848, has been repeatedly held. See *Grether* vs. *Wright*, 23 C. C. of App. 498; *Cummings* vs. *National Bank*, 101 U. S. 157. The remark made by the judge delivering the opinion in the Nichols case, so-called, 51 O. S. p. 515, was an inadvertent dictum. In order to meet the objection that the law under discussion was unconstitutional because it provided no appeal, it was suggested that the power vested in the state auditor by section 167, Revised Statutes, to correct errors of assessment, though not supplying a complete remedy, is not inapplicable to the procedure under the act of April 7, 1893; but giving to the statement its full force, it contains not the slightest intimation that the remedy to get rid of an illegal assessment, or the illegal levy of taxes, is

not as provided by section 5848 of the statutes. The proceeding in that case was under that section. Both the Circuit Court and the Circuit Court of Appeals held the jurisdiction was complete in the federal court to enjoin the collection of taxes assessed upon the illegal addition made in this case. In so holding they but followed the holding of this court in *Cummings* vs. *National Bank*, 101 U. S. 153, wherein it was contended that the federal courts would not enjoin the illegal levy of taxes, but would leave the parties to their remedy at law. This was an Ohio case and involved the question, whether the federal court would exercise the jurisdiction conferred by section 5848.

The court said (p. 157), "But the statute of the state expressly declares that suits may be brought to enjoin the illegal levy of taxes and assessments or the collection of them. Sec. 5848 of the Revised Statutes of Ohio, 1880; Vol. liii, Laws of Ohio, 178, sec. 1, 2. And though we have repeatedly decided in this court that the statute of a state cannot control the mode of procedure in equity cases in federal courts, nor deprive them of their separate equity jurisdiction, we have also held that, where a statute of a state created a new right, or provided a new remedy, the federal courts will enforce that right either on the common law or equity side of its docket, as the nature of the new right or new remedy requires. *Van Norden* vs. *Morton*, 99 U. S. 378. Here there can be no doubt that the remedy by injunction against an illegal tax, expressly granted by the statute *is to be enforced*, and can only be appropriately enforced *on the equity side of the court*." This ruling is decisive of the question of jurisdiction."

In *Van Norden* vs. *Morton*, 99 U. S. 378, it was held:

"Where a statute grants a new right or a *new remedy* for the violation of an *old* right, or whenever such rights *and remedies* are dependent on the *state statutes* or on acts of Congress, the jurisdiction as between the law side and the equity side of the federal courts must be determined by the essential character of the case."

Here it is clearly implied that a remedy created by statute for the violation of either a new or an old right, and whether provided by a state statute or act of Congress, will be enforced by the federal court. Hence, to hold that section 167 prescribes the only tribunal before which parties must go to get rid of an illegal valuation of property for taxation, is to annul section 5848, and overturn repeated decisions of this court, and the entire practice in the State of Ohio in its relation to illegal taxation.

Respectfully submitted,

W. W. BOYNTON

Solicitor for Appellee.

# Supreme Court of the United States.

No. 227.—October Term, 1901.

Marcellus A. Lander, as Treasurer of Cuyahoga County, Ohio, Appellant,
*vs.*
The Mercantile National Bank of Cleveland, Ohio.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

[June 2, 1902.]

This suit was brought in the Circuit Court of the United States for the Northern Division of Ohio, Eastern District, to restrain the collection of certain taxes levied by the officers of Cuyahoga County, Ohio, upon the appellee bank. The grounds of the suit were that the acts of the taxing officers of said county were in violation of the "rights of the plaintiff (appellee) and of its shareholders accorded to them by section 5219 of the Revised Statutes of the United States, securing to said shareholders a restriction of the rate and limit of taxes assessed upon their said shares to that assessed upon other moneyed capital in the hands of individual citizens of the State of Ohio."

The bill alleged that the plaintiff (appellee) was a national bank, and stated the capital stock of the bank and the number of shares into which it was divided; that its cashier made the proper returns of the resources and liabilities of the bank to the county auditor; that the latter fixed the value thereof, as required by section 2766 of the Revised Statutes of the State, after deducting the assessed value of the real estate of the bank, and transmitted a statement of his action, and a copy of the report made by the cashier, to the State board of equalization, for incorporated banks and that board, professing to act under sections 2808 and 2809 of the Revised Statutes of the State, increased the valuation of the shares without notice to the bank or to its shareholders, and that the board was hence without jurisdiction to make such increase, and "its action in respect thereto was void and of no effect."

It was averred "that said State board of equalization knowingly and designedly did fix a much higher per centum of valuation and assessment for taxation upon the shares of the plaintiff's capital stock than was assessed upon other moneyed capital in the hands of individual citizens of the State of Ohio, and much higher than that fixed on other moneyed capital in the hands of such citizens in said county of Cuyahoga and said city of Cleveland."

Section 2730 of the Revised Statutes of Ohio was set out in the bill, which defines "credits" to be the excess of certain legal claims and demands over and above legal and *bona fide* debts, and it was averred "that a large amount of moneyed capital in the hands of individual citizens of the State of Ohio invested in promissory notes and other legal obligations, securities, claims and demands, amounting to several hundred millions of dollars, is by the aforesaid provision, allowing a deduction of legal *bona fide* debts to be made therefrom, expressly exempted from taxation."

Figures were given in support of the allegation as to individuals, "building and loan incorporations," which, it was alleged, "were empowered and authorized by said statute to borrow and loan money and to do a general banking business with their members and depositors," and savings banks, in which it was alleged that there was on time deposit an amount exceeding the entire capital stock of all the national banks in the State, which deposits were credits belonging to the depositors from which legal *bona fide* debts were authorized by the statute to be deducted in order to ascertain the taxable value of said deposits.

That on account of such exemptions unlawful discrimination was practiced against moneyed capital invested in national banks, and that the tax lawfully assessed and paid on its shares by complainant amounted to upwards of twenty per cent of the income which arose from its operations.

That each of the shareholders was indebted in an amount of *bona fide* debts, "exclusive of the exceptions allowed by the statute, to an amount equal to the actual and par value of the number of shares specified opposite their respective names, and which said excess of said debts over said credits as aforesaid, the said shareholders above named were entitled to have deducted from the assessed value of said shares so severally owned by them."

Proof of this indebtedness was submitted to the county auditor, but he refused to make any deduction, and threatened to collect taxes on such shares with said deductions disallowed.

That the right to have such deductions made was adjudicated in a suit brought by plaintiff on the 8th of April, 1887, against Horatio N. Whitbeck, the predecessor of the defendant, as treasurer of Cuyahoga County, and also in other suits brought against other predecessors of the defendant, in which said suits the issues were the same as those in the present suit, and that each of the defendants in said suits "represented the same interest, sustained the same relation, was charged with the same duties to the public as the present defendant," and in which the issues determined and adjudged "involved the same subject-matter, and that the judgments therein given are wholly unreversed and still in full force and operation."

The bill prayed for an injunction of the collection of any of the taxes which were charged on the duplicate tax list of the county, "including

those levied on such unlawful increase of valuation by such State board of equalization for incorporated bank shares, permitting, however, said treasurer, without prejudice to his rights in the premises, to receive the amounts so as aforesaid tendered by the plaintiff to him."

The answer admitted some of the averments of the bill and tendered issue on those upon which complainant based the charge of illegality of and discrimination in the assessment. As to the action of the auditor the answer alleged that "the auditor was greatly deceived and misled by complainant's statement of the true value of its returns to him for taxation, and that the returns so made did not exceed forty (40) per cent of the actual value of said property and assets of complainant; when in truth and in fact the said complainant should have returned the same at its true value in money." And also averred "that said board of equalization began work at the time the statutes require, and continued its work continuously, but for want of the necessary information it could not complete its work earlier than December 6, 1897."

In an amendment to the answer the deception of complainant cashier as to the true value of the shares was again averred, and the justness and legality of the action of the State board of equalization were circumstantially asserted.

As a second defense it was alleged that section 167 of the Revised Statutes of Ohio was in *pari materia*, and was a part of the taxing system of the State and of the machinery for the collection of the public revenue of the State, and provided that when the amount of taxes to be remitted exceeded $100, as in the case at bar, that the board of revision provided for by said section, consisting of the governor, auditor of State and attorney general, was constituted an appellate board to the action of the State board of equalization, of shares of incorporated banks, and had the power and authority and jurisdiction to review, revise and correct all excessive, illegal or erroneous assessments, fines or judgments that might have been made by said board of equalization; that complainant, not having appealed to such board of revision, and by refusing to submit to such board its "cause and the matters in dispute, had not exhausted its usual and ordinary remedy at law," and had not exhausted the remedies provided by the statutes of Ohio, and hence the court had "no jurisdiction in equity to hear and determine said cause, and said plaintiff bank should not be permitted to further prosecute its action herein."

The case was referred to a master, and upon the coming in of his report, and, after considering the exceptions of the parties to it, the court dissolved the injunction which had been granted and dismissed the bill. (98 Fed. Rep. 465.) That action was reversed by the Circuit Court of Appeals and the cause remanded, with instructions to enter a decree in favor of the complainant (appellee here). (109 Fed. Rep. 21.) Thereupon this ap-

peal was taken. Other facts are stated in the opinion. Most of the sections of the Revised Statutes of Ohio on the subject of taxation, which are applicable to the questions involved, are printed at length in 173 U. S., page 209, *et seq.* Other sections are inserted in the margin* or referred to in the opinion.

Mr. Justice McKenna, after stating the case, delivered the opinion of the Court.

The Circuit Court of Appeals based its opinion on two questions: (1) The jurisdiction of the State board of equalization for incorporated banks to increase, without notice to the bank, the valuation fixed by the county auditor on the shares of its stock; (2) the fact of the former adjudications as determining the right to reduce the valuation of the shares by taking *bona fide* indebtedness therefrom. Counsel for appellee objects to a broader discussion by appellant's counsel of the case than those questions present, urging they were the only ones made by the appellee in the Circuit Court of Appeals. In view of this insistence, and as appellee took the case to the latter court, we may make them the grounds of our discussion and decision, although the first question was not passed upon by the Circuit Court.

The findings of the master sustained the allegations of the bill as to the action of the auditor, and that the board of equalization met as required by section 2808 of the Revised Statutes of Ohio, and transacted no business except to adjourn "at the call of the secretary." It met again on the 10th and 20th of September, but took no action as to the valuation of the shares

---

*"Sec. 2807. The said boards (certain city boards,) shall hear complaints and equalize the assessment of all personal property, moneys and credits, new entries and new structures returned for the current year, by the township assessors and county auditors; and they shall have power to add to, or deduct from the valuation of personal property, or moneys or credits, of any person returned by the assessor or county auditor, or which may have been omitted by them, or to add other items upon such evidence as shall be satisfactory to the said boards, whether said return be made upon oath of each person or upon the valuation of the assessor or county auditor, but when any addition shall be ordered to be made to any list returned under oath, a statement of the facts upon which such addition was made shall be entered on the journal of the boards: *Provided*, That no such addition shall be made to such list returned under oath without the board having first given reasonable notice to the person or persons whose personal property is sought to be added to or the valuation thereof increased, to appear before said board at a time and place to be fixed by said board, and show cause why such addition should not be made, or why such valuation should not be increased; . . ."

"Sec. 2808. The governor, auditor of State and attorney general shall constitute a board for the equalization of the shares of incorporated banks, and for this purpose they shall meet on the third Tuesday of June, annually, at the office of the

of plaintiff. "On the 4th December, 1897," (the master found,) "the members of said board next met at the call of the State auditor to consider unfinished business. The record of the meetings of said board, as originally made by the secretary, shows that at the meeting held June 15, 1897, September 10, 1897, September 20, 1897, the 'board adjourned.' At the meeting held December 4, 1897, the secretary was directed to amend the record as to each of said above-named adjournments by adding these words: 'Amended to read, "adjourned to meet at the call of the president of the board, Asa S. Bushnell, governor of the State,"' and thereupon said board adjourned *sine die*. Some time after December 4, 1897, the record was amended by the secretary as directed by said board. At none of said adjournments was a day named for the next meeting.

"Eighth. At said meeting on December 4, 1897, without complaint from any one, the members of said board, assuming to act as a board, increased the valuation of the shares of the plaintiff from $519,320.00, so fixed by the county auditor, to $642,320.00, and on the 6th day of December certified said valuation to the auditor of Cuyahoga, County, to be by him placed on the treasurer's duplicate, which was accordingly done; that neither of said meetings of the members of said board following the third Tuesday of June, 1897, was called by said secretary, and no notice or information of any kind or opportunity to be heard was given by said board, its secretary or any other person to said bank, or any of its officers, directors or shareholders of any or either of said meetings, except such as the statute gave them, to wit, section 2808, Revised Statutes, and succeeding sections; nor did they, or either of them, have any notice of any of said meetings or appear thereat, and the first information that said bank or any of its shareholders had or received of any action of the board or of the purpose to increase the value of the shares so fixed by the auditor was on the 7th day of December, 1897, after the action of the board was had and such information was conveyed by letter from the auditor of the county to the cashier of the plaintiff, notifying him of the completed action of the board; that thereupon, said bank and its shareholders, through the officers and agents of the bank duly authorized, applied to the mem-

---

auditor of State, and examine the returns of said banks to the county auditors, and the value of said shares as fixed by the county auditors as the same shall have been reported by the county auditors to the State auditor."

"SEC. 2809. Said board shall hear complaints and equalize the value of said shares according to the rules prescribed by this title for valuing and equalizing the values of real and personal property, and if the judgment of the board, or a majority of them, the aggregate value of all the bank property so reported to said board by the county auditors is below its true value in money, they may increase or diminish the value of said shares by such per cent as will equalize said shares to their true value in money: *Provided*, That said board shall not increase or reduce the grand aggregate value of bank shares as returned by the several county auditors by more than twenty (20) per centum."

"SEC. 2810. The auditor of State shall, forthwith after such equalization shall have been made, certify to the auditors of the proper counties the valuation, as equalized, of the shares of banks situated in such counties, which valuation shall be put on the proper tax list."

bers of said board for a hearing, and was notified that two of the members of said board were out of the State, and that December 28 was as early as the bank officers could be received; that on said day the officers of said bank, on behalf of said shareholders duly authorized, met the members of said board at Columbus, and made application for a hearing respecting the valuation of said shares and the action of said board, and notified said members of said board that such increase made on the shares of said bank was excessive and unwarranted, and protested against the same, but said hearing was denied, the members of said board declaring that the board had adjourned *sine die* and could not reconvene as a State board of equalization for banks to consider any claim or application respecting the value of said shares.

"At the time the persons who had composed the State board of equalization for banks, and who are the same persons required to act under section 167 of the Revised Statutes of Ohio, offered to convene and organize under said section 167 to consider the case of the various plaintiff banks at such time as might be convenient for the representatives of the Cleveland banks to appear.. Some doubt was expressed by some of the members of the committee that the board would not have the power under section 167 to afford as full relief as the board of equalization, and only one of the Cleveland banks appeared before the board when organized under section 167, viz., the First National Bank; the others declined to appear.

"Ninth. That the said auditor of said county of Cuyahoga, upon the receipt of the certificate from said State board of equalization, entered said valuation of $642,320.00 upon the tax duplicate of said county for the year 1897, and assessed against the same taxes at the rate of 3.03 cents on each dollar, and which amounted on said valuation to $19,462.30. The taxes on said bank shares at the said rate of 3.03 on each dollar, if assessed on the valuation of $519,320.00, as fixed by the auditor of Cuyahoga County, would have amounted to the sum of $15,735.39."

As conclusion of law the master reported that the increase made by the board of equalization was void for want of notice to the bank or its shareholders.

The Circuit Court of Appeals concurred in the legal conclusions of the master upon the ground that "it is an elementary principle of law that tribunals vested with the power to effect the property of citizens must act with notice," and in the light of that principle considered the statutes o Ohio, and construed them to require the State board of equalization to give notice to persons to be effected by its action. That is, as we understand, notice other than the statute gives by designating the time and place of the meeting of the board.

The court deduced its conclusion from the provisions of section 2809 of the Revised Statutes of Ohio. It is there provided that "said board (board of equalization) shall hear complaints and equalize the value of said shares according to the rules prescribed by this title, and for valuing and equalizing the values of real and personal property." The title referred to is Title 13, and turning to it we find quite an elaborate system. Many boards of equalization are constituted. There are annual county boards,

annual city boards, annual State boards for railroads and for banks, decennial State, county, and city boards, and the duties of all the boards are carefully prescribed. In the sections constituting some of these boards there are references to sections constituting other boards. For instance, in section 2804, providing for a county board of equalization, there is this provision: "Said board shall have power to hear complaints, and to equalize the value of all real and personal property, moneys and credits, within the county, and shall be governed by the rules prescribed for the government of decennial county boards for the equalization of real property: *Provided*, . . . the annual county board shall not increase or reduce the valuation of any real estate, except upon reasonable notice to all persons directly interested, and an opportunity for a full hearing of the question involved." The rules referred to are contained in section 2814, and pertain strictly to producing uniformity of valuation. In other words, the board is enjoined to raise or reduce the valuations returned in order to make them conform to the standard of valuation prescribed by the statute. There is a limitation upon the power of the board with which we are not concerned. The board afterwards sits as a board of revision.

Again, section 2705 provides for a city board of equalization, and it is given all the "powers," and is to be "governed by the rules, provisions and limitations prescribed in the next preceding section for the annual county board." (Section 2804, *supra.*) So, again, in section 2805 certain State boards are given "all the powers provided by law for decennial county boards for the equalization of real property, and shall be governed by the rules prescribed for such decennial county boards for equalizing the valuations returned by district assessors." These careful provisions for equalization of valuation seems to have been caused by the command of the Constitution of the State that taxation should be by "uniform rule," and we think, furnished the key to the meaning of section 2809. In execution of the constitution of the State that section defined and enjoined the powers of the board in the equalization of values, and did not intend to require personal notice to shareholders of the exercise of those powers.

We agree with the Court of Appeals that some notice was necessary to be given, and the question occurs, did the statute give notice by fixing the time of the meeting of the board? It seems to be conceded that the statute did do so as to the first meeting of the board, and that such notice would have been sufficient as to subsequent adjournments if they had been made to days certain.

In the case of *Hamilton* v. *Dempsey*, (20 Ohio St. 168,) the Supreme Court of Ohio decided that the law of the State which fixed the time and place of meeting of a board of equalization, but which provided for no other notice, nevertheless gave notice to every citizen whose property, real or personal, had been returned for taxation.

In *State ex rel.* v. *Jones, Auditor,* (51 Ohio St. 492,) the same proposition was affirmed in passing upon the law providing for the taxation of the property of express, telegraph and telephone companies. It was contended, and we quote from the opinion of the court—

"The property of the express company, it is alleged, was taken without due course of process of law in this, that the act in question does not provide for any notice to the company, nor for a hearing by the board of appraisers and assessors, nor for an appeal to any superior authority for the correction of illegal, erroneous or excessive valuations."

Replying to the contention, the court said:

"The law itself states the time when the board shall meet, and the express company could not ignore the time of meeting. The meetings of the board are not secret, and the company had a right to be present and explain the statement rendered of its property and the value thereof. Indeed, without notice from the board, or by the terms of the law, the company would have been unable to make the return prescribed by the statute. And of the company's return it may be said, in the language of the opinion in the *Kentucky Railroad Tax cases,* (115 U. S. 321): 'This return, made by the corporation through its officers, is the statement of its own case, in all the particulars that enter into the question of the value of its taxable property, and may be verified and fortified by such explanations and proofs as it may see fit to insert.'"

The court also cited *The State Railroad Tax cases,* (92 U. S. 575.)

In the latter cases, it was claimed that the State board of equalization had no power to increase the assessment or value of railroad property reported by the companies to the State auditor and by him to the board without notice to the companies, and for want of such notice "the whole assessment and the levy of taxes" became void. The court said, by Mr. Justice Miller: "It is hard to believe that such a proposition can be seriously made." After pointing out the "absurdity" of the claim, he added: "Nor is there any hardship in the matter. This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked." See also *Hayes* v. *Reclamation District,* (108, 111 U. S. 701;) *Palmer* v *McMahon,* (133 U. S. 660;) *Merchants' Bank* v. *Pennsylvania,* 167 U. S. 461.)

We do not think the principle of those cases is affected by an adjournment of the Ohio board without fixing a date of meeting. How were the rights of the bank affected and to what inconvenience was it put? It did not appear at the first meeting of the board. It rested on the evidence it had returned to the auditor, and it knew that the report it had made to the comptroller of the State would be before the board, and it knew also the duties and power of the board. The board was a public tribunal, open to be invoked, and charged with duties, and necessarily subject to adjourn-

ments. What it had done the bank could have easily ascertained, and as easily what it contemplated doing. An inquiry would have ascertained both. By the exertion of a very trifling trouble the bank would have been informed of every meeting of the board.

2. The master's report on the claim of *res judicata* was as follows:

"The master finds the issues made by the bill and answer, relating to the former adjudications of the question of the right to deduction of legal *bona fide* indebtedness of the stockholders from the value of their shares in determining their value for taxation, with the defendant; that such fact or right was not directly involved in the actions set up in the bill and it was not therein by said courts adjudicated and decided, and the fact carried into judgment in favor of said bank, that its stockholders were entitled to said deductions of indebtedness from the value of their shares, under the same legislation now existing on the subject, both State and national, and that said judgments are not in full force and effect, as against said defendant."

The Circuit Court concurred with the master. The court, after expressing that its impressions at the oral argument had been to sustain the plea of former adjudication, said:

"Looking into the bill, however, in the former case, and after an examination of the case of *National Bank of Wellington* v. *Chapman*, I find that, in order to support the averments of the bill, it was necessary in that case for the complainant to rely, not only upon the statute of Ohio defining credits, but also on its practical operation in exempting moneyed capital in the hands of individuals in Ohio from taxation. The practical operation of a law of that character, to show how much, if any, discrimination there is, is a question of fact to be determined upon the evidence."

And further:

"The adjudication, therefore, upon which the complainant relies, is an adjudication, not of law, but of fact; not of the fact at issue in the present case, but of the fact as to the practical operation of the law at the time of that adjudication, to wit, in 1887, 1893, and in 1894."

The Circuit Court of Appeals reviewed the *Whitbeck case*, (127 U. S. 193,) and considered its interpretation by this court in *National Bank of Wellington* v. *Chapman*, (173 U. S. 205.) From that review the court declared that it was not "prepared to say that the judgment in that case was *res judicata* as to the rights of complainant's stockholders, to deduct their debts from their shares of national bank stock." But to the other adjudications the court expressed a different view and held them to be prior and conclusive adjudications of the issue now involved. In other words, we understand the court to decide, that in the former cases unlawful discrimination was made by the Ohio statute, "and that it had been adjudicated therein (in the cases pleaded) that national bank shareholders were entitled to deduct their debts from the value of their shares for the purpose of taxation," and that the adjudication should prevail as an estoppel against the appellants,

notwithstanding the statute has been subsequently construed not of itself to work such discrimination. The conclusion is claimed to be sustained bythe decision of this court in *New Orleans* v. *Citizens' Bank*, (167 U. S. 371.)

A consideration of the records in the pleaded cases becomes necessary.

In the Whitbeck case the plaintiff (appellee here) averred that it was a bank and had been discriminated against; that its cashier had made reports to the taxing officers according to law; the auditor *pretended* to proceed in fixing value of its shares in accordance with section 2766 of the Revised Statutes of Ohio, and that the value placed by him thereon was knowingly in excess of the value fixed in said county on other moneyed capital in the hands of individual citizens of the State, city and county. The State board of equalization assumed, and pretended to comply, with sections 2808 and 2809, and examined the report of the cashier and return of the auditor, and pretended to equalize said shares to their true value in money, and fixed their valuation at $495,774.76.

The further action of the board was described as pretended with the design, and the execution of the design, of placing an excessive value on the shares; that a large part of the stock of the bank was invested in United States securities and the lawful money thereof, and the tax levied and assessed was in violation of law and unauthorized and void.

The requirements of the constitution of the State were cited and the restriction of the taxation of national bank shares by the Revised Statutes of the United States was stated.

The definition of credits by section 2730 was given, and it was averred that the law required persons who listed property for taxation to set forth their credits as defined; that a large part of moneyed capital in the hands of individuals, which was invested in notes, obligations and credits, were, by the provisions allowing the deduction of *bona fide* debts, exempted from taxation, which made a discrimination against national bank shares in violation of section 5219 of the Revised Statutes of the United States.

The names of the shareholders were set out, and it was averred that they were indebted in an amount in excess of credits equal to the value of their respective shares. That at the time of the return and statement to the auditor the fact of such indebtedness was not known, nor was there opportunity given the shareholders to deduct such indebtedness, nor was there provision made for the deduction of such indebtedness from the value of the shares, but before the taxes became due proof of the indebtedness was tendered and a demand made for its reduction. The proof and demand were refused, and the payment of the whole tax insisted on. The illegality of the taxes was asserted for the following reasons:

1. Because in violation of the act of Congress under which the bank was incorporated.

2. The laws of Ohio permitted the owner of credits to deduct therefrom his *bona fide* debts, and denied such right to the "owner of capital

stock" of the bank, and required him to list "the whole number of shares owned by him and not simply the excess of the value of said shares over his indebtedness." A discrimination was hence averred to result from the taxation of such shares at much greater rate than was assessed upon other moneyed capital in the hands of individual citizens.

3. The property of the bank was not valued and taxed as the property of individuals, nor was equality preserved in the valuation of the shares as compared with other property in the locality, but the valuation was twice as high, while the rate of levy was the same.

4. Illegality of the action of the board of equalization under the State laws.

5. The taxation of the shares was at a greater rate than was assessed upon other moneyed capital in the hands of individuals.

6. That by the proceedings had in the assessment and levy of the taxes had the effect to deprive the bank and its shareholders, "both in the manner of valuation and equalization, of all benefit of the constitution and general laws of the State, by which only uniformity in the burdens of taxation upon all description of property could be secured, to take from them the security afforded by the limitations of the acts of Congress, and to impose upon them such excessive exactions as to make the franchise granted by said act comparatively valueless."

There were averments of grounds of relief in equity which we need not quote.

The respondent filed a demurrer to the bill, which was overruled. An answer was then filed, which denied the allegations of the bill, from which it was claimed discrimination against the complainant and its shareholders resulted.

The following are quotations from the answer: The defendant denies "that any of the shareholders of said banking association, at the times named in said bill of complaint, were indebted or owing to others of *bona fide* debts, a sum in excess of the credits from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of his said shares or any part thereof. He denies that either of said shareholders was then indebted in any sum whatever, or that, even if any of them was so indebted as claimed in said bill of complaint, he is thereby entitled to deduct the excess of such indebtedness over his credits from the assessed value of his said shares, or that for any reason said shares of stock should not have been placed on the tax duplicate and no tax assessed thereon. This defendant denies the averment in said petition that neither of said shareholders authorized any one to list his said shares for him. He denies that it was necessary for said shareholders so to do. . . . That any sum whatever should be deducted from the valuation of the shares of the capital stock owned by said shareholders named in said bill of com-

plaint. This defendant further denies that the taxes so levied and assessed on the shares of said complainant's stock are, for the reasons alleged in said bill of complaint, or for any reason, unjust, illegal or void."

A special master was appointed "to examine the evidence and record on file and to report who, if any, of the shareholders of the complainant, on the day preceding the second Monday of October, 1885, had *bona fide* indebtedness which should have been deducted from the valuation of the shares."

The master reported "that having examined the evidence and heard the claim of counsel, he finds and reports that all the shareholders are entitled to the deductions as charged in the bill, except the following, who should be taxed for the amount stated, viz: E. R. Perkins had credits subject to taxation above his indebtedness on the day named to the sum of $4,374.40; C. L. Murfry had credits subject to taxation above his indebtedness on the day named to the sum of $724; Robert L. Chamberlain had credits subject to taxation above his indebtedness on the day named to the sum of $4,448; James Parmelee had credits subject to taxation above his indebtedness on the day named to the sum of $3,113.60; James Barnett had credits subject to taxation above his indebtedness on the day named to the sum of $17,792."

A decree was entered in accordance with the finding, and recited that the court found all the allegations of the bill to be true except as to the three stockholders mentioned by the master. Except as to them, the respondent and his successors in office were enjoined from collecting the taxes remaining unpaid.

This decree was afterwards by consent vacated, and two questions certified to this court. The only one with which we are concerned was as follows:

"Whether the taxation of national bank shares in the State of Ohio in the year 1885, without permitting the shareholder to deduct from the assessed value of his shares the amount of his *bona fide* indebtedness existing on the Wednesday next preceding the second Monday in May in 1885, and on the day preceding the second Monday in April, 1885, is a discrimination forbidden by the act of Congress, the said shareholder not having deducted said *bona fide* indebtedness from any credits owned by him at either of said dates."

In the case against Kimberly, treasurer, the pleadings were substantially the same as in the Whitebeck case, and the following judgment was entered:

"The court further find that there should be deducted from said first valuation the sum of $169,235, being the amount on which the particular shareholders named in said bill of complaint are not taxable, the same being less in amount and value than their *bona fide* debts from which they are entitled to have the same deducted, leaving the sum of $380,670, which is hereby declared to be the true valuation of the shares of said bank taxable under the act of Congres for said year 1888."

In the Shields cases, (there were two, respectively numbered 5122 and 5127,) the bills on the merits were the same as in the Whitbeck case, and the Whitbeck case was pleaded as a prior adjudication of the right of the shareholders of complainant to deduct their *bona fide* debts from the value of the shares of stock. The bill in No. 5122 alleged that "in said suit (Whitbeck suit) this complainant alleged by its bill the refusal by the then auditor of said county, to allow a deduction of *bona fide* debts of the shareholders from the value of shares of stock of said complainant owned in large part by the same stockholders as those above named, and in which action said treasurer of said county, admitting said refusal to allow said deduction so joined issue as to present the question of the right of said owners of said shares, to said deduction, in view of the laws of Ohio, the said laws being the same as the present laws of the State and those under which the taxing officers of said county acted in 1892 and 1893, in making assessments and in refusing deductions to be made of *bona fide* debts of stockholders from the valuation of said shares; and the complainant says that upon the issue so joined the said court at its April term, A. D. 1887, held and determined that said shareholders were by law entitled to said deduction of *bona fide* debts from the value of their said shares, to an equal amount fixed for taxation." The same allegations were substantially made in case No. 5127.

A demurrer was filed to the bill in No. 5122, which was overruled, and the respondent electing to stand by his demurrer, the following judgment was entered:

"The parties appearing by counsel, this cause came on for hearing, and by consent of the parties the judgment or order *pro confesso* heretofore entered in said case, is hereby vacated, and the respondent has leave to demur to said complaint; and thereupon came the respondent and demurred to the bill of complaint; and the cause came on for hearing upon said demurrer and was argued by counsel; on consideration whereof it was ordered, adjudged and decreed that said demurrer be and the same is hereby overruled, and the defendant electing to stand by his demurrer, the court upon further hearing find the allegations of the complainant's bill to be true, and that the tax therein sought to be enjoined was illegally assessed and entered upon the treasurer's duplicate for collection. It is therefore ordered, adjudged and decreed that the defendant and his successors in office be and they are hereby perpetually enjoined from collecting or in any way or manner attempting to collect the said illegal tax set out and particularly described in said bill of complaint."

In case No. 5127 Shields did not appear, and a decree was entered restraining the collection of taxes.

The law of *res judicata* is well settled. Its essential principle is, that questions once litigated shall not be litigated again between the same parties or their privies. And it may be conceded that the appellant in the case at bar is a privy to his predecessors in the suits which are pleaded

as prior adjudications, and that *res judicata* applies to tax cases if the cause of action relied on is the "thing" which was "adjudged" in a prior suit. (*New Orleans* v. *Citizens' Bank, supra.*)

But the final question is, what was the "thing adjudged" in the prior cases? The answer to the question is found in the pleadings in those cases and in the judgments which were entered. In the Whitbeck and Kimberly cases the judgments were substantially alike. They adjudged a deduction of the *bona fide* debts of the shareholders from the valuation of the shares. The judgment in the Shields case, No. 5122, was more general. It found "the allegations of the bill to be true, and that the tax therein sought to be enjoined was illegally assessed and entered upon the treasurer's duplicate for collection." The judgment in case No. 5127 was equally as general.

But those were conclusions from propositions not only of law but of fact, end granting that one of the propositions of law was the construction of the Ohio statute, (a wrong construction, as has since been held,) a necessary element of fact was that the discrimination complained of was effected through the practical operation of the statute in the years the assessments were made. This was pointed out in *National Bank of Wellington* v. *Chapman*, (173 U. S. 205.) In that case the same contentions were made as in this, and the same statute was passed upon. And also the effect and extent of *Whitbeck* v. *Mercantile National Bank* were carefully considered, explained and defined,

All the cases pleaded as *res judicata* were based on the Whitbeck case, and there was in each, as we have said, the fact of the practical operation of the Ohio statute exempting from taxation moneyed capital in the hands of individuals, and that fact determined the judgments in each case. In other words, as the Circuit Court found, the complainant in those cases (appellee here) relied not only upon the statute but upon its practical discriminatory operation. And we need not point out that judgments based on such discrimination in 1885, 1887, 1893 or 1894 cannot be conclusive proof of the existence of discrimination in 1896 or 1897.

In the case at bar the fact of discrimination was put in issue by the pleadings, and on the issue made the Circuit Court found in effect adversely to appellee. In the other cases the discrimination was either proved or admitted.

*The judgment of the Circuit Court of Appeals is reversed and the judgment of the Circuit Court is*

*Affirmed.*

Mr. Justice GRAY did not hear the argument and took no part in the decision.